90-1499

No.

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

JAMES ROWLAND, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, et al.,

Petitioners,

v.

MAURICE S. THOMPSON, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether state prison officials are entitled to the dissolution of a nine-year old remedial decree governing prison conditions for condemned inmates under the standards recently announced in *Oklahoma City Public Schools [Etc.] v. Dowell*, __U.S.__, 111 S.Ct. 630 (1991), for dissolving a school desegregation remedial decree?

II. Whether the Eleventh Amendment to the Constitution of the United States should bar the enforcement of a state prison conditions remedial decree that does not spring from, address or relate to a violation of federal law?

III. Whether the deference due prison officials on questions of prison operations and security should require modification of a prison conditions remedial decree as proposed by state prison officials, where the proposed modifications comport with constitutional requirements?

IV. Whether district court orders that require the parties to negotiate a settlement or which interpret a remedial decree to apply to certain prison facilities and direct a special master to investigate compliance constitute appealable orders, such that failure to appeal precludes appellate review?

LIST OF PARTIES

The parties to the proceedings below were petitioners, James Rowland, the Director of the California Department of Corrections (former Director, Jiro Enomoto), and Daniel Vasquez, the Warden of San Quentin State Prison (former Warden, George Sumner). Respondents here and below are male inmates condemned to death under California law and housed in security housing facilities at San Quentin. The named inmates, who sued on behalf of themselves and all others similarly situated, are Maurice S. Thompson, Charles A. Green, John Gzikowski, Keith D. Williams, Ronald E. Lanphear, Chol Soo Lee and Andrew E. Robertson.

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Petitioners, James Rowland, Director of the California Department of Corrections, and Daniel Vasquez, Warden of San Quentin State Prison, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in these proceedings on October 4, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 915 F.2d 1383, and is reproduced in the separate appendix. App. at 1-20. Four unpublished orders of the district court from which petitioners appealed are also reproduced: Order of October 5, 1989, (including the Fourth Report of the Monitor), App. at 31-105; Order of December 18, 1986, App. at 106-107; Order of January 17, 1987, App. at 108-118; and, Order(s) of March 25, 1985, App. at 119-126.

JURISDICTION

On October 27, 1989, a motions panel of the court of appeals granted petitioners' emergency application for a stay pending appeal. App. at 24. The court of appeals entered judgment on October 4, 1990, and denied rehearing and suggestion for rehearing *en banc* on January 8, 1991. App. at 23. This petition is timely filed within ninety days. The stay remains in effect by order of the court of appeals pursuant to Federal Rules of Appellate Procedure 41. App. at 27 and 30.

This Court has jurisdiction to review the judgment under 28 U.S.C. §1254(1).[1/]

STATUTES INVOLVED

The statutes involved are 42 U.S.C. §1983 and 28

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1. On February 19, 1991, this Court granted Certiorari in two cases which present questions substantially related to or fairly included within the instant Questions I, II and III, in *Vose v. Inmates of Suffolk County Jail*, No. 90-1004, and *Rufo v. Inmates of Suffolk County Jail*, No. 90-954.

U.S.C. §§ 1291 and 1292(a)(1). They are reproduced in the appendix. App. at 127-128.

STATEMENT OF THE CASE

This case concerns whether prison officials must continue to operate California's condemned row for men in San Quentin State Prison according to the detailed provisions of a federal court consent decree entered in October, 1980. When entered, the decree addressed conditions in a unique 68-cell facility where all the condemned inmates were then housed. App. at 54. At the time there were 44 condemned row inmates, seven of whom were named plaintiffs. There were no findings of liability and the decree recited that its entry was not an admission of a violation of law. Moreover, the decree provided that the case was to be dismissed in its entirety at the end of one year if the petitioners complied with the decree. Even though full compliance in the original facility was achieved by no later than April 1982, because the condemned population had by then outgrown the row, rather than dismiss the case as the decree required, in June 1982, the district court ordered the parties to negotiate modifications to the decree to encompass another, structurally different, facility. *Thompson v. Enomoto,* 542 F. Supp. 768, 770 (N.D. Cal. 1982). No inmate class, however, had been certified.

From time to time over the next eight years, petitioners and the inmates tried without success to negotiate a new decree governing conditions in the facilities which came to house most of the inmates, which today number nearly 300. Failure to reach agreement, however, did not mean petitioners disregarded either the decree or their other legal obligations. They continued to comply with the decree in the original unit, a record of compliance virtually unbroken from April 1982, to the present. Compliance with some of the decree's provisions in the other facilities, however, was rendered impossible by

the structural differences between them and the original unit. This chiefly concerned the provision for indoor-out-of-cell recreation time, or "tier-time." The single-tiered original unit ("North Segregation") was laid out in a way that allowed inmates to be released from their cells to mingle on the tier, play ping-pong and table games, and use exercise equipment. The other facilities where the ever-increasing condemned population have been housed – Carson Section and, since 1988, East Block – are five-tier 500-cell units with narrow walkways in front of the cells on the top four tiers and staff offices on the bottom tier. Those facilities are unsuitable for indoor inmate recreation. Petitioners, after due consideration and in their professional judgment, also determined a few other decree provisions to be unnecessary, too burdensome, or potentially dangerous in Carson Section and East Block and excluded them from the condemned row program in those facilities.

Other than the exceptions referred to above, however, petitioners adopted the original decree as the blueprint for the condemned program in Carson Section and East Block. They substituted a generous daily outdoor exercise and recreation program for the tier recreation available only in North Segregation. In addition to the yard exercise equipment, they placed the table games and exercise equipment required to be on the tier in North Segregation, except for ping-pong tables, on the Carson and East Block yards for the inmates' use.

Consequently, the inmates' conditions of confinement over the years more than satisfied Eighth Amendment standards and were substantially equivalent to those required by the decree. The inmates, however, continued to insist they were entitled to the letter of the decree in each facility. In 1983, they filed their first contempt motion to that effect in connection with "Grade A"

inmates housed in a five-tier facility[2/]. Petitioners responded that the decree was not intended to apply to Grade A inmates in facilities other than North Segregation and, because of structural differences, that the letter of the decree could not be enforced in other units. They also submitted to the district court a detailed proposed decree for those facilities which contained most of the features set forth above. They argued in support of the proposed decree that it fully complied with all applicable state and federal laws and asked that it be entered as a modification to the original decree.

The district court denied, in pertinent part, the inmates' contempt motion as well as petitioners' motion to modify. It ordered further negotiations. And it ordered that North Segregation, because it was the only unit where full compliance was possible, be reserved for those inmates classified Grade A and who, consequently, were allowed tier-time. This order remains in effect and has had the collateral consequence of preventing petitioners from using the most secure unit in San Quentin and one of the most secure in the state to house inmates, such as Grade Bs, who pose an even greater security risk than the Grade A condemned.

The inmates filed another contempt motion in 1984, then in 1985 withdrew it in favor of a motion to appoint

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2. "Grade A" is the decree classification for approximately 90 percent of the condemned men; according to the decree and its adaptation in Carson Section and East Block, inmates classified Grade A are entitled to tier-time or daily yard, respectively. Petitioners' motion to modify the decree in regard to Grade B inmates, who are not entitled to tier-time, was granted and affirmed on cross-appeal. *Thompson v. Enomoto,* App. at 20. The June 1982, order to negotiate was directed at Grade B conditions in the Adjustment Center, which is neither a Grade A nor a five-tier facility. The statement to the contrary in the district court's order, App. at 55, is incorrect. *Thompson v. Enomoto,* 572 F. Supp. at 769-770; *cf., Thompson v. Enomoto,* App. at 6, 16-17.

a special master (the "Monitor") on the grounds that petitioners' continued failure to comply with the decree in Carson Section justified further court intervention. Petitioners again objected that the decree did not apply to Carson Section. When the district court granted the motion, petitioners appealed on the same grounds. The court of appeals dismissed the appeal, holding that the appointment was an unappealable interlocutory order and petitioners could renew their arguments "when the district court decide[d] whether to adopt the Monitor's recommendations" concerning Carson section. *Thompson v. Enomoto,* 815 F.2d 1323, 1327 (9th Cir. 1987).

In 1986, the inmates refiled their contempt motion regarding compliance with the decree in Carson Section. In response, the First Report of the Monitor was submitted to the court. The Monitor concluded that the petitioners were correct that the decree did not apply in Carson Section. The Monitor made no findings concerning decree compliance in that unit[3/] and recommended that the district court adopt his interpretation of the decree's scope. The inmates objected to that portion of the Monitor's Report. In December 1986, the district court reversed the Monitor, ruled the decree should be interpreted to apply to "segregated condemned inmates...wherever housed" at San Quentin, and remanded the Carson Section contempt motion for further investigation. App. at 106-107.

On motion for reconsideration decided January 17, 1987, the court declined to vacate its reversal of the Monitor's conclusion about the scope of the decree. App. at 113-116. The court purported only to interpret rather than modify the decree, expressly ruled that its interpretation was only "interlocutory," App. at 112, did

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3. The court of appeals' implication to the contrary is incorrect. *Thompson v. Enomoto,* App. at 9.

not hold petitioners in contempt, and remanded the inmates' Carson Section contempt motion for further investigation. In view of the court of appeals' earlier admonition to await action on the Monitor's recommendations before again appealing, petitioners did not appeal the court's ruling and order.

Thereafter, three more Monitor's Reports were issued. The Second Report, issued in July 1987, made no findings concerning compliance outside North Segregation and was never entered as an order. The Third Report was issued in November, 1988. It construed the court's January 1987, memorandum and order as in effect having certified a class of all condemned inmates at San Quentin and reported the results of the Monitor's investigation of compliance with the decree in East Block. The North Segregation inmates had been moved to East Block due to the renovation of North Block plumbing, heating and ventilation, and the cells themselves, as ordered in other litigation to which condemned inmates were not parties. The renovation of East Block had by then been substantially completed. The renovation was not required by the decree.

The Third Report described some variations from the letter of the decree. Most which affected Grade A inmates were the result of having substituted the 4-1/4 hour per day, seven day per week yard program for the 6 hour daily indoor tier program. In regard to each variation from the decree, the Monitor recommended the court order petitioners to show cause why they should not be held in contempt. The court so ordered.

A. **The District Court Order**

Petitioners responded by moving to vacate the decree in its entirety, or in the alternative, to adopt the thoroughly constitutional East Block condemned program as the decree for all inmates for one year, then to dissolve it as the parties had originally agreed. Petitioners argued that the inmates' conditions of confinement fully

comported with constitutional requirements and had for many years. There is therefore no need for the decree at all, much less for strict adherence to its provisions. Moreover, the cases decided since its entry had established that virtually the entire decree -- and every provision alleged not to have been adhered to in East Block -- unambiguously exceeded constitutional minima and therefore was not an enforceable remedy absent continued Eighth Amendment violations or intransigence in curing past violations. Petitioners relied upon traditional principles of equitable jurisdiction, the deference due their expertise in prison administration and, in later briefing, the Eleventh Amendment. Petitioners also contended it was impossible to comply with every decree provision in East Block and that the East Block condemned program was in substantial compliance with the decree.

The inmates replied that petitioners had struck a bargain to settle a federal court action and should be required to adhere to its letter, absent "a grievous wrong evoked by new and unforeseen conditions," *United States* v. *Swift & Co,* 286 U.S. 106, 119 (1932). They did not dispute that the inmates' conditions of confinement were and had been constitutional. Rather, they contended that the decree remained valid as a compromise of their *state* law claims, as well as their claim to a Fourteenth Amendment substantive due process or equal protection right not to be segregated on the basis of their capital sentence alone. They asked that the East Block program be made over in the decree's image and that the court retain jurisdiction to ensure that petitioners continued to comply.

After a hearing on the order to show cause and petitioners' motions, the Monitor issued his proposed Fourth Report. In it the Monitor purported to "reconcile" *U.S. v. Swift & Co.,* with later cases that have recognized a more flexible standard for decree modification in, at least, institutional reform cases. To do so, the Monitor

adopted a "standard" for modification that is not susceptible of any definition.[4]

The proposed Report (incorporated in pertinent part into the district court order on appeal) recommended, that (1) petitioners' substitution in East Block of the daily yard program for the North Segregation indoor tier program be allowed, but that even more yard time, from more than four hours each day to more than five hours, be added, App. at 67, and that petitioners be required to provide ping-pong tables, App. at 77, and serve lunch on the yards, App. at 81; (2) the existing yard showers be plumbed with hot water, App. at 80; (3) a roof be constructed over part of the Grade A East Block yards, App. at 71; (4) a storage shelf be installed in each of the more than 200 cells occupied by Grade A inmates, App. at 83; (5) despite having access to hundreds of other items, inmates be allowed to purchase from the canteen toothpicks, dental floss, baby oil, shoe polish, plastic spoons and dairy creamer even though, in petitioners' opinion, these items pose a security threat in a SHU (security housing unit) environment, App. at 88; and, (6) petitioners allow inmates to use the off-the-row SHU law library, App. at 101, and obey noise standards, App. at 104, ordered in a case concerning non-condemned SHU inmates housed in five-tier units, including East Block.

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4. "[S]tripped of excess verbiage, the decision in each of the seminal cases ultimately turned upon the court's judgment as to whether, under all of the specific 'facts and circumstances' present, the lower court acted within its equitable discretion in granting or denying modification to the party so moving. [Citations omitted.] This standard should be used here...." App. at 51. The "excess verbiage," however, is an attempt at articulating limits on the exercise of the courts' discretion, "since discretionary action almost by definition means an action...that is not subject to appellate reversal." Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 Yale L.J. 635, 645 (1982).

See, Toussaint v. McCarthy, 597 F.Supp. 1388 (N.D.Cal 1984), *affd. in part & revsd in part, Toussaint v. McCarthy,* 801 F.2d 1080 (9th Cir. 1986).

The Report recommended no change in the North Segregation condemned program and recommended denial of petitioners' motion to be allowed to house all Grade A inmates in East Block, App. at 62, in effect modifying the decree to create two separate condemned row programs. It also recommended petitioners be cited for contempt for disobeying the yard roof, shelving and hot yard shower decree provisions in East Block.

Petitioners not only objected to the recommendations on the grounds that none of them were required under the Constitution or by past constitutional violations, they had also submitted extensive, largely uncontradicted evidence demonstrating that differences between East Block and North Segregation rendered those recommendations unnecessary, financially burdensome, awkward to implement, wasteful and a security risk. Most of this evidence was ignored, summarily dismissed, or discounted in favor of substituting the Monitor's judgment for that of petitioners.

The Report agreed with petitioners that the decree substantially exceeds applicable Eighth Amendment standards, App. at 58-62, including all the provisions that petitioners were not strictly complying with in East Block. The Report did not identify any unconstitutional conditions. But, concluded the Monitor, that did not mean petitioners were entitled to have the decree vacated.

The Monitor explained that, in his view, the inmates had a "plausible" liberty interest in being housed in the general population at San Quentin, App. at 56, and therefore they could not be segregated other than through procedures which comport with due process. This liberty interest is purportedly derived from the Department of Corrections' administrative segregation regulations. Since that was one of the allegations of the 1979 complaint, the

Monitor concluded the decree should be seen as a compromise of that claim and therefore still a valid remedy for a constitutional violation. App. at 61.

Petitioners timely filed objections to this part of the proposed report on the grounds (1) that the administrative segregation regulations did not apply to condemned inmates, who were segregated as a matter of long-standing policy and sound correctional practice for reasons unique to their situation within the penal system;[5] (2) that even if the regulations did apply to them, their death sentences met the regulations' criteria and they had been afforded all procedural safeguards due them in establishing the substantive predicate for segregation; and, (3) even if the regulations applied to them and the procedures employed to order them segregated were inadequate, the court of appeals had held that a decree which specified conditions of confinement was not an appropriate remedy for a procedural due process violation -- the remedy for the latter is adequate process, not work programs, or exercise schedules, ping-pong tables, shelving, and the like. *Toussaint v. McCarthy,* 801 F.2d at 1106.

The Monitor rejected those contentions without comment and submitted the Fourth Report to the court unchanged in that respect. Petitioners repeated all their objections to the Report in a timely motion and in

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5. This is the practice followed in most states with condemned prisoners. *See, Management of Death Row Inmates,* Ch. V, pp. 1-6, American Correctional Assoc., prepared for National Institute of Justice, U.S. Dept. of Justice (1988). No other federal court has held condemned inmates have a liberty interest in general population housing, despite the prevalence among the states of segregation regulations similar to California's. In Pennsylvania, which has such regulations, *see, Hewitt v. Helms,* 459 U.S. 460 (1983), a trial court dismissed on summary judgment a claim that the condemned could not be housed in segregation solely on the basis of their sentence, a ruling the plaintiffs did not challenge on appeal. *Peterkin v. Jeffes,* 855 F.2d 1021, 1023 (3rd Cir. 1988).

addition they moved the court reconsider its interpretation of the decree to encompass Grade A facilities other than North Segregation.

The district court denied petitioners' motions and, on October 5, 1989, entered the Fourth Report as its order. It reiterated the Monitor's conclusion about the inmates' liberty interest in general population housing without responding any more than had the Monitor to petitioners' disagreements with that conclusion. App. at 35. Petitioners now contend, as they did in the district court and on appeal,[6/] that that conclusion is plainly wrong. It serves only to obscure the fundamental issues of federal court jurisdiction presented by this case.

B. **The Decision of the Court of Appeals**

Petitioners appealed from the October 1989, order, the Monitor's appointment in 1985, and the orders interpreting the decree to apply to condemned inmates "wherever housed" at San Quentin.

In regard to the construction of the decree to apply to condemned inmates "wherever housed," the court of appeals held that the petitioners had waived their right to object to the district court's "modification" of the decree to apply throughout the prison by failing to timely appeal the June 1982, order to negotiate modifications and the January 1987, memorandum order interpreting the decree. *Thompson v. Enomoto,* App. at 17. Another circuit, and another panel of the Ninth Circuit, have held nearly identical orders to be non-appealable.

The court of appeals also held that the "consent decree as interpreted by the [c]ourt presents no Eleventh Amendment problem." *Id.* at 19. The court simply noted that the action was brought against "state officials, not the State, to vindicate constitutional rights under the Eighth

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6. The court of appeals also did not respond to petitioners' arguments on this issue. *See, infra.*

and Fourteenth Amendments[; t]his is not barred by the Eleventh Amendment[,]" citing *Ex Parte Young*, 209 U.S. 123 (1908), and stated that "[w]e are now dealing with a consent decree in an action against state officials to vindicate constitutional rights." *Id.* at 18.

Petitioners' Eleventh Amendment attack on the district court order did not rely on whether the named defendant was the state rather than state officials, any more than had this Court in deciding the Eleventh Amendment question in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984). The court of appeals did not respond at all to the merits of petitioners' actual Eleventh Amendment argument, one that was extensively briefed by both parties and about which the courts of appeals are in conflict.

The court of appeals also failed to address petitioners' challenge to the denial of their motion to vacate or, at least, to modify the decree in light of the history of compliance in North Segregation, the constitutional conditions of confinement in East Block, and the changed circumstances and intervening clarifications in the law, which together eliminate the need for further enforcement of the decree or the imposition of any additional obligations in East Block. As this Court's intervening decision in *Board of Education Of Oklahoma City Public Schools v. Dowell*, __U.S.__, 111 S.Ct. 630 (1991), makes plain, these are potentially dispositive jurisdictional issues of fundamental importance to every state and local governmental entity currently operating or which will operate in the future subject to a federal court decree.

REASONS FOR GRANTING THE WRIT

The jurisdictional issues presented by this case are important and timely. What must state prison officials do, and for how long, before they are entitled to an order vacating a prospective decree governing conditions of

confinement and ending federal court oversight? Even if continued oversight were justified in a particular case, that should not end the inquiry. Where prison conditions have long since been brought into compliance with the Constitution but changed circumstances, such as an increase in inmate population, render full compliance with the consent decree impracticable, should not a district court accept decree modifications proposed by prison officials which also fully comport with constitutional requirements?

Answers to these questions vary among and within the circuits. The variation is not solely, or even principally, the result of the complexity and consequent variety of the fact patterns presented in the cases. In large part the conflicts result from the differing doctrinal approaches to defining the limits of equity jurisdiction in post-judgment proceedings.[7] As the institutional reform litigation -- especially prison litigation -- begun during the past two decades matures, the questions related to when and how jurisdiction should end have become as critical as those which, when asked at the beginning of the structural reform era, defined when and how the federal judiciary should seek to remedy federal constitutional violations. The conflict in the cases on these questions reflects both their importance and the increasing frequency with which the courts are being asked to address them.

This Court's decision in *Oklahoma City Public Schools [Etc.] v. Dowell*, 111 S.Ct. 630, announced after the court of appeals denied rehearing in this case, addresses the showing to be made on a motion to vacate a school desegregation remedial decree. The underlying rationale in that case, if applied to the instant prison conditions decree, should entitle petitioners to an order

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7. Note, *The Modification of Consent Decrees in Institutional Reform Cases*, 99 Harv. L.R. 1020, 1028 (1986).

vacating the decree and ending the case. That is especially so here, since in addition to the limits on equity jurisdiction emphasized in *Dowell*, the jurisdictional limits inherent in the states' Eleventh Amendment immunity apply.

The decisions below also conflict with this Court's oft repeated direction that when considering either liability or remedies, trial courts should defer where possible to the professional judgment of state prison administrators. This principle should apply no less to rulings on motions to modify remedial decrees. Where prison officials propose to modify a decree rendered unenforceable by changed circumstances, modification should be liberally granted as proposed if the modifications comport with constitutional requirements, especially where the conditions are shown to be constitutional, to have remained so for years, and where there is no evidence of official intransigence in curing past violations.

The Writ should be granted on these questions to examine how *Dowell* is to be applied in prison conditions litigation, and to address the split in the circuits concerning the application to post-judgment proceedings of both the Eleventh Amendment and other limits on equity jurisdiction. The Writ should also be granted to protect the integrity of the consent decree process. State and local correctional officials have become wary in recent years of entering into consent decrees in the face of uncertain fiscal, penal and legal circumstances for fear they will be forced to forever comply with a decree that proves impractical or excessive. The lack of a coherent standard for either decree dissolution or modification is one source of their concern.[8/] This concern may contribute

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8. Correctional Law Reporter, Vol. I, No. 5, at 73: "While settling these complicated lawsuits...has the attraction of avoiding extended and expensive litigation, many administrators have come to curse the consent decree signed years ago, which still dictates

to a reluctance to participate in the efficient resolution of new cases by consent.

This Court, in the exercise of its supervisory authority over the administration of justice, should also examine and reject the district court's patently erroneous conclusion, unexamined by the court of appeals, that somehow California prison regulations having nothing to do with condemned inmates nevertheless bestow on them a "liberty interest" in being housed with the San Quentin general population. *But the Court need not do so to reach the important jurisdictional questions.* Even if the courts below were correct, the decree is still an entirely inappropriate remedy in a procedural due process case.

Finally, litigants in compiex litigation should not be confronted with conflicting standards governing whether a post-judgment order is appealable. The court of appeals' conclusion that petitioners waived their objection to expansion of the decree into other Grade A facilities not only fails to explain how that waiver could include objections to modifications not even proposed until years later, it directly conflicts with at least one other court of appeals' decision on when similar orders in post-judgment proceedings are appealable.

I. THE COURT OF APPEALS' DECISION CONFLICTS IN PRINCIPLE WITH THIS COURT'S DECISION IN *OKLAHOMA CITY PUBLIC SCHOOLS V. DOWELL*, BECAUSE THE INMATES' CONDITIONS OF CONFINEMENT ARE CONSTITUTIONAL AND WILL REMAIN SO.

After the court of appeals denied rehearing, this Court construed its precedents concerning consent decree modification in connection with a school board's request to vacate a desegregation decree. *Oklahoma City Public*

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how a facility must be operated."

Schools v. Dowell, 111 S.Ct 630. The Court held that "where the purposes of the desegregation litigation had been fully achieved[, n]o additional showing of 'grievous wrong evoked by new and unforeseen conditions' is required of the School Board" to entitle it to an order vacating the decree. *Id.* at 637, quoting *United States v. Swift & Co.,* 286 U.S. at 119. To demonstrate that "the purposes of the desegregation litigation had been fully achieved," a school board must show that the "School District was being operated in compliance with the commands of the Equal Protection Clause of the Fourteenth Amendment, and that it was unlikely that the School Board would return to its former ways." *Id.* at 636-637.

Equally compelling "considerations based on the allocation of powers in our federal system," *id.,* apply here in connection with petitioners' motion to vacate the condemned row decree. State prisons, no less than school systems, were not meant to be subject to federal court decrees "in perpetuity." *Id.* at 638. Like education policy, the "inordinately difficult undertaking...[of prison administration is] peculiarly within the province of the legislative and executive branches of government.... [S]eparation of powers concerns counsel a policy of judicial restraint." *Turner v. Safley,* 482 U.S. 78, 85 (1987). Unlike school boards, however, whose violation of the Constitution by definition requires a lengthy period of oversight to assure "the vestiges of *de jure* segregation had been eliminated...," *Dowell, at 638,* prison officials are ordinarily required only to end the identified constitutional violation. Absent intransigence in moving to bring about constitutional alignment, *see, Hutto v. Finney,* 437 U.S. 678, 687 and n. 9 (1978), a reasonable period of oversight in prison cases, therefore, should if anything be on average much shorter than in a desegregation case. *Cf. accord, id.* at 711-714, (Rehnquist, J., *dissenting*).

In 1979, when the complaint was filed in this action,

California had been incarcerating condemned inmates under a reenacted death penalty law for only two years. After the decree's entry, they moved quickly to comply. When their motion to vacate was denied, petitioners had complied with and exceeded the terms of the decree for nearly nine years in the only unit where literal compliance was possible. In the other units petitioners adapted the decree as best they could, substituting substantially equivalent privileges where possible. Moreover, as the result of court orders in other cases to renovate North and East Blocks, the condemned inmates benefitted from an upgrade in the physical facilities that was not required by the decree. Consequently, since the decree's entry there has not been even one *allegation* of a constitutional violation related to the inmates' conditions of confinement.

As measured by the cases decided since its entry the goal of the decree here -- constitutional prison conditions -- has certainly been achieved. In 1981, this Court held "conditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional. To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society....[T]he Constitution does not mandate comfortable prisons...." *Rhodes v. Chapman*, 452 U.S. 337, 347, 349 (1981). The Third Circuit has since applied those standards in a comprehensive conditions of confinement case brought by Pennsylvania's condemned inmates. *Peterkin v. Jeffes,* 855 F.2d 1021 (3rd Cir. 1988). The *Peterkin* trial court had examined virtually every aspect of the state's treatment of condemned prisoners, concluding each challenged condition of confinement was constitutional under *Rhodes*. *Peterkin v. Jeffes,* 661 F.Supp 895 (E.D. Pa. 1987). The Third Circuit, in pertinent part, affirmed. *Peterkin v. Jeffes,* 855 F.2d at 1022. The Ninth Circuit also twice spoke to the conditions of confinement for non-condemned San Quentin segregation inmates, in *Wright v.*

Rushen, 642 F.2d 1129 (9th Cir. 1981), and *Toussaint v. McCarthy*, 801 F.2d 1080.

The conditions of confinement for California's condemned inmates meet and exceed the constitutional standard established in *Rhodes*, as illustrated particularly in both *Peterkin* and *Toussaint*.[9] This Court has also held there is no Fourteenth Amendment substantive due process right not to be segregated from the general population for administrative reasons. *Hewitt v. Helms*, 459 U.S. 460, 466-467 (1983). And *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), barred federal courts from enforcing state law against state officials. These post-entry developments in the law have severed entirely the relationship between the decree and the federal and state law claims advanced in the underlying complaint. [10]

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9. For instance, the 29 3/4 hours of outdoor exercise allowed the Grade A condemned inmates in East Block each week is more than twice the 14 hours allowed Pennsylvania's condemned row inmates and the 10 hours ordered in *Toussaint*. In Pennsylvania, moreover, exercise is taken alone or with one other inmate in small, uncovered, narrow yards devoid of any exercise or recreational equipment. The yards lack even a drinking fountain. In contrast, California inmates exercise together on large yards with plentiful and varied exercise and recreational equipment and a cold water shower, none of which is required by the Constitution.

10. It is on this point that this case is most clearly distinguishable from two decisions relied on by the district court, *Badgley v. Santacroce*, 853 F.2d 50 (2d Cir. 1988) and *Kozlowski v. Coughlin*, 871 F.2d 241 (2d Cir., 1989). In *Badgley*, the jail conditions were and remained unconstitutionally crowded, conditions which would only have been exacerbated by the disputed modification. 853 F.2d at 53-54. In *Kozlowski*, the requested modifications would have changed provisions "deeply rooted in federal law," 871 F.2d at 243, which "fell within the ambit of the pleadings" in a case where liability had been established at trial. *Id.* at 245. Here, it is unreasonable to conclude that vacating the decree could impede "the ability to obtain

Under the circumstances, nearly nine years -- far longer than the parties had initially agreed -- should have been more than enough time to have "enable[d] the [d]istrict [c]ourt to observe the good faith of [petitioners] in complying with the decree" in North Segregation and the Constitution in the other facilities. *See, Dowell* at 637-638. The district court should therefore have dismissed the case and relieved defendants of any further obligation under the decree. The court, however, decided that the Due Process Clause of the Fourteenth Amendment protects a condemned inmate's right not to be deprived, without due process of law, of a "plausible," App at 56, liberty interest in general population housing and privileges, derived from the Department's administrative segregation regulations. App at 61. From this sole premise, the district court concluded that the decree remains viable as a compromise of a "colorable" federal constitutional right, App. at 35, and should not be vacated. The court of appeals, in apparent reference to that conclusion, held that "as interpreted by the district court," App. at 19, the decree could be enforced.

Petitioners contend that that conclusion is plainly *very* wrong.[11] The district court's superficial treatment of

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the ultimate goal" of the decree. *Id.* at 248. Petitioners' treatment of the condemned fully comports with the law, as it has for years. The "ultimate goal" has long since been achieved.

11. Those regulations have always applied to non-condemned inmates only. *See, Toussaint v. McCarthy*, 801 F.2d at 1097; "[n]othing in [the regulations] purports to limit the Department of Correction's authority to segregate inmates to the circumstances enumerated....." Condemned housing is simply not covered in the regulations. Instead, San Quentin and the Department historically followed a policy of segregating condemned inmates since long before the departmental regulations were first enacted. And the Department has consistently interpreted its segregation regulations as not applying to the condemned. That was the case when this action was both filed and settled, and it remains the case today. Even if the segregation

the question and the court of appeals' unfortunate refusal to articulate a basis for its affirmance argues for this Court to exercise its authority over the administration of justice and either decide the issue or vacate the decision with directions for rehearing.

Even if, however, the inmates' procedural due process claim were valid, it would not follow that petitioners' motion to vacate the decree should have been denied. It is not necessary to reach the "liberty interest" question before examining whether the courts below applied the appropriate standard for decree dissolution in a prison case, or whether, as petitioners contend, the courts improperly enshrined the decree as the law of the case separate from the constitutional values it was meant to enforce.[12/]

In *Dowell,* at 635, this Court rejected the view that "an injunction takes on a life of its own and becomes an edict quite independent of the law it is meant to

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regulations did apply to condemned inmates, however, the regulations are nevertheless fully consistent with the practice of assigning inmates sentenced to death to security housing. The Department has determined that the condemned as a class warrant segregation due to their suicide, escape, and danger potential. The courts below did not even attempt to suggest how, given that policy, any condemned inmate could "reasonably form an objective expectation" that he would be housed in the general population, nor did they explain how the "regulations [are] . . . worded in such a way that an inmate could reasonably expect to enforce them against prison officials," so as to effect his release from segregation. *Kentucky Department of Corrections v. Thompson,* __ U.S. __, 104 L.Ed.2d 506, 518 (1989). The regulations therefore do not create a Fourteenth Amendment liberty interest for condemned inmates. *Id.*

12. The court of appeals avoided discussing guidelines for decree dissolution, but its singular reference to what might justify modification implies a one-way street favoring plaintiffs in institutional reform cases. *Thompson v. Enomoto,* App. at 12.

effectuate." Instead, the Court emphasized that prospective injunctive relief must "'directly address and relate to the constitutional violation itself.'" *Id.* at 637, quoting *Milliken v. Bradley,* 433 U.S. 267, 282 (1977); *and see, System Federation No. 91 Ry. Employees' Dep't. v. Wright,* 364 U.S. 642, 652-653 (1961); "[t]he parties have no power to require of the court continuing enforcement of rights the statute no longer gives," whether or not the rights were created by consent decree since "the court was not acting to enforce a promise but to enforce a statute."

Here, the permissible remedy for a procedural due process violation would be hearings which comport with due process, not the detailed prescription for living conditions and privileges in the decree. That was precisely the holding in *Toussaint,* 801 F.2d at 1106, in reversing an order requiring general population-like work privileges as a remedy for inadequate segregation procedures for non-condemned San Quentin inmates.[13/] Neither the district court nor the court of appeals explained how enforcing any or all of the decree's provisions could be justified in light of the Monitor's express conclusion that the decree -- as was said of the work requirement in *Toussaint* -- "emulates insofar as possible the daily activities available to San Quentin's general population inmates...." App. at 59. If the decree thus protects the inmates' "liberty interest" in freedom from arbitrary segregation, then the decree is no more an appropriate remedy than the

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13. "Requiring prison officials to provide work programs is an inappropriate remedy. The due process clause seeks to prevent denial of life, liberty or property by arbitrary decision. *Hewitt [v. Helms,* 459 U.S. at 476]; *Greenholtz [v. Inmates of the Nebraska [etc.],* 442 U.S. 1, 7 (1979).] The due process clause requires procedure. *See, Mathews v. Eldridge,* 424 U.S. [319, 335 (1976).] The district court's order, however, does not relate to enforcement of procedural protection. The work requirement relates only to conditions of confinement."

Toussaint work requirement.

It is not enough, therefore, to simply identify one claim among many in the complaint that might still justify prospective relief. On a motion to vacate a decree, the court should also examine whether the decree remains enforceable as an appropriate remedy. *Cf., Dowell,* at 637-638. If it does not, either because subsequent case law has determined that the decree does not properly address or relate to the identified claim or because the parties or the court were mistaken in fashioning it, it should be vacated. To do otherwise saddles public officials with continuing obligations that are not found in federal law. Petitioners submit the Court should grant the Writ so as to examine whether the principles at work in *Dowell* and the other cases cited above should prevent this result.

II. THE COURT OF APPEALS' DECISION CONFLICTS WITH OTHER APPELLATE DECISIONS, AND IN PRINCIPLE WITH THIS COURT'S DECISION IN *PENNHURST STATE SCHOOL & HOSPITAL V. HALDERMAN*, BECAUSE THE DECREE DOES NOTHING TO ENFORCE FEDERAL LAW.

As state officials, petitioners' discretionary authority to administer San Quentin State Prison is also protected by the Eleventh Amendment. *Cf. Turner v. Safley,* 482 U.S. at 85; "[w]here a state penal system is involved, federal courts have. . .additional reason to accord deference to the appropriate prison authorities. [Citation omitted]."

The Eleventh Amendment bars lawsuits against the states, and against state officials in their official capacity unless a suit seeks prospective relief from a federal law violation. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984); *Ex Parte Young*, 208 U.S. 213; *Edelman v. Jordan*, 415 U.S. 651 (1974). Although the issue in *Pennhurst* was whether federal courts have jurisdiction to enjoin state officials from violating state law, it follows logically that if the Eleventh Amendment bars federal courts from ordering state officials to obey state

law, the Eleventh Amendment also bars federal courts from ordering state officials to obey no legal requirement whatever. Such orders have nothing to do with holding state officials responsible "'to the supreme authority of the United States.'" *Id.* at 102, quoting *Ex parte Young*, 209 U.S. at 160, *and see,* 465 U.S. at 106.

The Eleventh Amendment should therefore bar a federal court's attempt to enforce a remedy that does not in at least some substantial part spring from, address or relate to an identifiable federal constitutional or statutory right. Here, the district court concluded the decree had little to do with enforcing Eighth Amendment standards. And even if the inmates have a liberty interest in not being deprived of general population housing without due process, the decree does not address or relate to what process may be due them before they are segregated.

Whether the Eleventh Amendment has any application at all to post-judgment proceedings is the subject of conflicting decisions of the courts of appeals. Two decisions from different circuits have recognized an Eleventh Amendment bar to enforcement of previously entered injunctive relief, including a consent decree, unless enforcement is needed to remedy a federal law violation. *Lelsz v. Kavanagh*, 807 F.2d 1243, *reh'g den.*, 815 F.2d 1034 (5th Cir.), *cert. dism'd.*, 108 S.Ct. 44 (1987); *Washington v. Penwell*, 700 F.2d 570 (9th Cir. 1983). But the Second and Tenth circuits squarely disagree.

In *Kozlowski v. Coughlin*, 871 F.2d 241 (2d Cir. 1989), the Second Circuit refused to accept the existence of an Eleventh Amendment bar to enforcement of a consent decree governing prison conditions. It relied extensively on *Firefighters Local No. 93 v. City of Cleveland,* 478 U.S. 501 (1986), where this Court held consent decrees executed by local officials which include remedies in excess of those authorized by statute nevertheless may be entered by the district court. The Tenth Circuit adopted this view in *Duran v. Carruthers*, 885 F.2d 1485

(10th Cir. 1989), *cert. denied*, 58 U.S.L.W. 3468 (U.S. 1990). But those courts may have badly misread *Cleveland*.[14]

The Fifth Circuit rejected the reading given *Cleveland* by the Second and Tenth Circuits. *Lelsz v. Kavanagh*, 807 F.2d at 1252. In turn, the Second Circuit expressly rejected the Fifth Circuit's interpretation as "illogical." *Kowzlowski v. Coughlin*, 871 F.2d at 244. The same result was reached in *Duran v. Carruthers*, 885 F.2d at 1491, where the Tenth Circuit followed *Kozlowski*.[15]

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14. First, *Cleveland* did not decide an Eleventh Amendment question; the defendants in *Cleveland* were not state officials but local officials and a municipal corporation who enjoy no Eleventh Amendment immunity. *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 280 (1977). Second, *Cleveland* intimates nothing about whether such decrees can be enforced over the objection of even a local official defendant; the city in *Cleveland* argued in *support* of the decree. Third, since this Court in *Cleveland* found the consent decree analogous to permissible private race-conscious remedial employment agreements and therefore not implicated by Title VII's prohibition against certain race-conscious orders imposed after trial (*id. at* 516-517), it held the decree was consistent with federal law. *Id.* at 521, *and see*, 530, (O'Connor, J., *concurring*). Here, petitioners contend that the Eleventh Amendment barred the district court from enforcing the decree over their objection and that therefore those orders do violate federal law. Consequently, little about the Court's discussion of the criteria for entry of a decree can be read as a "rejection" of either petitioners' or the Fifth Circuit's Eleventh Amendment position. The Court certainly did not hold that a consent decree can be enforced over a state official's objection if its enforcement was unnecessary to "vindicate the supreme authority of federal law." *Pennhurst [etc.] v. Halderman*, 465 U.S. at 106.

15. In *Carruthers*, the consent decree not only included an express acknowledgment that the decree exceeded constitutional and other legal requirements, *id.* at 1489, but it also barred defendants from ever seeking modification which would in any way "lessen the benefits provided by the agreement ...." *Id.* at 1487. The court set forth these concessions in full before rejecting an Eleventh Amendment bar to enforcement. *Id.* at 1491. *Carruthers* thus may have

The court of appeals decision in this case, while ambiguous, appears to adopt the position of the Second and Tenth Circuits, despite the earlier *Penwell* decision. This question therefore deserves plenary consideration.

III. THE COURT OF APPEALS' AFFIRMANCE OF DECREE MODIFICATIONS WHICH EXCEED CONSTITUTIONAL REQUIREMENTS CONFLICTS WITH THIS COURT'S DECISIONS RESPECTING THE DEFERENCE DUE PRISON OFFICIALS IN OPERATIONAL MATTERS.

Prison officials are entitled to "wide ranging deference to [their] expertise . . . in deciding how to best administer their prisons." *Peterkin v. Jeffes*, 661 F.Supp. at 899, citing *Hewitt v. Helms*, 459 U.S. at 474; *Hudson v. Palmer*, 468 U.S. 517, 524 (1984); *Whitley v. Albers*, 475 U.S. 312 (1986); *Youngberg v. Romeo*, 457 U.S. 307, 312 and n. 29 (1982). Deference is especially justified where institutional security is implicated, even where fundamental rights are allegedly infringed. *Turner v. Safley*, 482 U.S. at 89. This Court has repeatedly cautioned that "'the problems of prisons in America are complex and intractable, and, more to the point, are not readily susceptible of resolution by decree.'" *Id.* at 84, quoting *Procunier v. Martinez*, 416 U.S. 396, 404-405 (1974).

Yet when it comes to post-judgment proceedings in prison cases, these guidelines are frequently disregarded. So, for instance, in *Kowzlowski v. Coughlin*, 871 F.2d at 248, n. 8, the majority, over a vigorous dissent (*id.* at 249-250), refused to acknowledge a duty to defer to the expertise of prison officials when considering whether to

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posed difficult questions of Eleventh Amendment waiver not present here.

modify a consent decree.[16] Even assuming that an overriding concern for the finality of consent judgments justifies discarding the deference principle in determining *whether* to modify a decree (*id.* at 248, n. 8)[17], there is no reason to do so when deciding *how* to modify a decree once the need for modification is recognized.

But that is precisely what the courts below did here. As an alternative to vacating the decree, petitioners offered to substitute the East Block program for all Grade A inmates. They argued that clarifications in the law after the decree's entry and the differences between East Block and the original unit, as well as experience with the decree, operational and financial constraints, and security concerns, justified modifying the decree as they proposed. Although the court accepted the need to modify the decree for East Block, App. at 54, it substituted its own judgment for petitioners' as to which modifications to

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16. "Nor is this an instance where we must 'ordinarily defer to the[] expert judgment [of prison officials].' While these standards apply when evaluating the constitutionality of prison regulations, they play no role in determining whether changed conditions warrant modification of a consent decree." *Id.* Even if the need for "balance," *id.*, justified a close examination of the evidence offered in support of modification, it is unclear why the courts should *ignore* a prison administrator's expertise when evaluating a request for modification after having deferred to the same expertise in determining liability and entering the initial judgment. Prison officials do not become any less expert, nor courts necessarily more so, after entry of a consent decree.

17. *But see, Philadelphia Welfare Rights Org. v. Shapp*, 602 F.2d 1114, 1120 (3d Cir. 1979), *cert. den.* 444 U.S. 1026 (1980): "An approach to the modification of a complex affirmative injunction which over-emphasized the interest of finality at the expense of achievability would inevitably make defendants wary of any decree imposing more than the bare minimum of affirmative obligation. That wariness would, we think, tend to discourage the settlement of injunction actions by consent decree, a high price to pay for the benefits of finality."

adopt. Thus, the court of appeals' summary affirmance of the disputed modifications conflicts in principle with this Court's decisions respecting the deference due the expertise of prison administrators on just such matters.

In regard, for instance, to the order to provide ping-pong tables and allow the inmates to purchase the six canteen items, the record is replete with uncontradicted expert evidence of the danger these items pose in a five-tier SHU facility. The district court ruled, however, that only actual misuse of an item by a *condemned* inmate is relevant to proving the security risk connected with that item; thus, petitioners' expert evidence of the potential for misuse was disregarded. *E.g.,* App. at 77-78. But whether a condemned inmate rather than a non-condemned inmate in a SHU had already done what the restrictions are designed to prevent, is given little weight by prison officials with the responsibility for institutional safety and security. Once it is shown or can be anticipated that SHU security can be breached with a particular item, only the irresponsible prison administrator would fail to bar access to the item by *all* SHU inmates.

Similar disregard for not only petitioners' expertise, but petitioners' responsibilities for "planning, and the commitment of resources," *Turner v. Safley,* at 85, underlies the rest of the disputed modifications, especially those that order roofed yards and shelving, which would require the expenditure of scarce funds to little beneficial purpose.[18/]

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18. The disputed modifications certainly have no basis in the Eighth Amendment. Prisoners are not entitled to shelves, or to have lunch served on the yard, to play ping-pong or to possess baby oil, shoe polish, dairy creamer, plastic spoons, toothpicks, or dental floss. *See e.g., Wright v. Rushen,* 642 F.2d at 1131. No case has ever held that inmates are entitled to a *hot* shower on the exercise yard. The inmates receive three hot showers a week indoors in East Block; since they also have hot water in their cells, this more than satisfies the Eighth Amendment. *Toussaint,* 597 F. Supp. at 1423. Nor are the inmates entitled to a roofed yard, much less an indoor gymnasium

Even if the decree did relate to a cognizable federal right, this Court has required trial courts to accept the remedial proposals offered by public officials if they adequately address a constitutional violation. *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1, 11 and 16 (1971). An official's obligations under a decree should not be increased where its terms are sufficient to cure the violation. *Pasadena City Bd. Of Educ. v. Spangler*, 427 U.S. 424 (1976). Nor should the courts become "enmeshed in the minutiae of prison operations," since "the wide range of 'judgment-calls' that meet constitutional...requirements are confined to officials outside the Judicial Branch...." *Bell v. Wolfish*, 441 U.S. 520, 562 (1979).

The courts below simply ignored these guidelines.[19] Accordingly, the rejection of petitioners' proposal conflicts

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adjacent to their cells like the North Segregation tier area. *See e.g., Peterkin v. Jeffes*, 661 F.Supp. at 911; "[i]ndoor exercise facilities...are not mandated by the Constitution." Access to tier-time is the chief distinction between the North Segregation and East Block programs. It is a distinction without a constitutional difference. Petitioners should therefore be allowed to house all the Grade A inmates in East Block, freeing North Segregation to be used for the most serious security risks.

19. Some courts of appeals appear to follow these principles in evaluating prison officials' requests to modify a consent decree under a "flexible" modification standard. *Plyler v. Evatt*, 846 F.2d 208, 212, 215 (4th Cir. 1988) (prison decree not an ordinary contract to be strictly enforced); *Newman v. Graddick*, 740 F.2d 1513, 1520-1521 (11th Cir. 1984) (decree should require no more than "constitutional alignment"); *accord, New York State Assn. for Retarded Children v. Carey*, 706 F.2d 956, 971 (2d Cir. 1983) (*Swift* does not bar modifications consistent with reduced obligations found in subsequent case law). But other courts do not. *See e.g., Twelve John Does v. District of Columbia*, 861 F.2d 295, 298 (D.C. Cir. 1988) (emphasizing *Swift's* "new and unforeseen conditions" language); *Ruiz v. Lynaugh*, 811 F.2d 856, 861 (5th Cir. 1987) (same). *And see, Kowzlowski v. Coughlin*, 871 F.2d at 247, where the court adopts an ill-defined "quantum of necessity" test.

with this Court's decisions respecting the limits on the jurisdiction of the federal courts to order specific changes in how state prisons are to be administered.

IV. THE COURT OF APPEALS' DECISION CONFLICTS WITH ANOTHER COURT OF APPEALS' DECISION ON WHETHER CERTAIN POST-JUDGMENT ORDERS ARE APPEALABLE.

The court of appeals' decision squarely conflicts with *Ramirez v. Rivera-Dueno,* 861 F.2d 328, 333-334 (1st Cir. 1988), where the court held that an order that the parties should negotiate and the special master should report to the court on compliance and make recommendations was not an appealable injunction under 28 U.S.C. § 1292(a)(1).

Here, petitioners challenged the expansion of the decree to East Block on the grounds they had not consented to apply it in five-tier facilities, that its expansion could not be justified as an "interpretation" in aid of the decree's purpose, and that if seen as a modification the expansion was inconsistent with the underlying law, relying, *inter alia*, on *Firefighters Local Union No. 1784 v. Stotts,* 467 U.S. 501, 573-576, and n. 9. (1984). The court of appeals held petitioners had waived their objection to the decree's expansion, App. at 17, and that *Stotts* would in any event not bar the decree's "modification," *id.*, since "the interpretation of the decree...does not *conflict* with any statutory or constitutional requirement." *Id.* at 18 (emphasis added).[20/]

The two orders the court of appeals held were appealable, however, were not "final decisions" under 28 U.S.C. § 1291, *Gulfstream Aerospace Corp. v. Mayacamas*

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20. Petitioners also relied upon *Stotts* in objecting to the specific modifications ordered by the court. The court of appeals' narrow interpretation of *Stotts* conflicts with *Stotts'* disapproval of decree modifications, ordered over defendants' objection, which are "inconsistent" with the underlying law. *Id.* at 576, n. 9.

Corp., 485 U.S. 271, 275 (1988), nor were they "collateral" orders "effectively unreviewable" on appeal from a final order. *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 468 (1978). They also were not injunctions or, on their face, modifications of the decree so as to be appealable under 28 U.S.C. § 1292(a)(1). App. at 128. *Cf. accord, Rowland v. U.S. Dist. Court For N.D. of Cal.,* 849 F.2d 380, 382 (9th Cir. 1988). The 1982 order merely ordered negotiations. The December 1986, and January 1987, orders interpreted the decree to apply in the other facilities and ordered the Monitor to investigate compliance -- *petitioners* were not ordered to do anything. Decree interpretations, without more, are not orders "granting, continuing, modifying, refusing or dissolving injunctions,..." *Id.* The Writ should therefore issue on this question.

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that the Writ of Certiorari should be granted.

DATED: March 13, 1991

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Supreme Court, U.S.
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No.

**IN THE SUPREME COURT
OF THE
UNITED STATES**

OCTOBER TERM, 1990

JAMES ROWLAND, DIRECTOR,
CALIFORNIA DEPARTMENT OF CORRECTIONS, et al.,

Petitioners,

v.

MAURICE S. THOMPSON, et al.,

Respondents.

SEPARATE APPENDIX
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAURICE S. THOMPSON; CHARLES A. GREEN; JOHN GZIKOWSKI; KEITH D. WILLIAMS; RONALD E. LANPHEAR; CHOL SOO LEE; ANDREW E. ROBERTSON, individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

v.

JIRO J. ENOMOTO (former Director, California Department of Corrections; current Director James Rowland); GEORGE SUMNER, Warden (former Warden, San Quentin State Prison; current Warden Daniel Vasquez),

Defendants-Appellants.

No. 89-16335

D.C. No. CV-79-1630-SAW

MAURICE S. THOMPSON; CHARLES A. GREEN; JOHN GZIKOWSKI; KEITH D. WILLIAMS; RONALD E. LANPHEAR; CHOL SOO LEE; ANDREW E. ROBERTSON, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

JIRO J. ENOMOTO (former Director, California Department of Corrections; current Director James Rowland); GEORGE SUMNER, Warden (former Warden, San Quentin State Prison; current Warden Daniel Vasquez),

Defendants-Appellees.

No. 89-16420

D.C. No. CV-79-1630-SAW

OPINION

Appeal from the United States District Court for the Northern District of California Stanley A. Weigel, District Judge, Presiding

Argued and Submitted April 16, 1990—San Francisco, California

Filed October 4, 1990

Before: Procter Hug, Jr., Otto R. Skopil, Jr. and Mary M. Schroeder, Circuit Judges.

Opinion by Judge Hug

SUMMARY

Prisons and Jails

Affirming a district court judgment, the court of appeals held that the district court did not abuse its discretion in modifying a consent decree to extend to all areas wherever death sentence inmates were housed.

Appellant Maurice S. Thompson and other inmates sentenced to death brought suit against prison officials, alleging a violation of their due process rights because of prison conditions. The inmates and prison officials had previously entered into a consent decree requiring certain corrective actions at the prison, including housing, treatment, and certain inmate privileges. Corrective measures were to be taken within a year. However, the increase in the prison population necessitated the transfer of some of the inmates to another facility. Inmates lost certain rights and privileges under the decree. The inmates asked the court to extend jurisdiction for six months and to hold the prison officials in contempt for not complying with the decree. A time extension was granted by the court. Six months later, prison officials had not yet complied with the decree. Although the court denied to hold the officials in contempt, it ordered modification of the decree. Negotiations failed. A monitor's report indicated prison officials were not in compliance with the consent decree, but did not recommend contempt on the part of the officials. A motion by prison officials for reconsideration was denied and not appealed. Prison officials moved the monitor to modify the decree to handcuff prisoners while transported. That motion was also denied. Subsequently, a third report issued asking prison officials to show cause why they should not be held in contempt. Eventually, prison officials moved to modify the decree to conform to their present inmate confinement. This was again denied, the monitor recommending that officials be ordered to comply with the decree or be in contempt. The officials appealed this last report.

[1] A consent decree has attributes of both contracts and judicial acts. [2] A district court has the power to modify a consent decree to achieve the decree's primary goals. [3] The court disagreed with the prison officials' argument that the court had lost its jurisdiction to modify the decree. It was too late to contend after eight years of negotiation and four monitor's reports that the terms of the consent decree required termination of the court's jurisdiction. Neither party objected to the initial extension of jurisdiction. [4] The district court was correct in determining that the scope of the decree applied to all the inmates sentenced to death at the prison, wherever they were housed. Although prison officials had an opportunity to appeal modification of the decree after the monitor's first report, they did not do so. [5] The court rejected the argument that the district court could not modify the decree to extend to all areas in question. The interpretation of the decree did not conflict with any statutory or constitutional requirements. [6] The eleventh amendment did not bar the action. The consent decree, as interpreted by the court, presented no eleventh amendment problem. [7] However, the district court did not abuse its discretion in granting modification of the decree to deprive the inmates of various benefits they previously enjoyed.

COUNSEL

Jeffrey D. Wohl, Orrick, Herrington & Sutcliffe, San Francisco, California, Donald Specter, Laura B. Prado, Prison Law Office, San Quentin, California, for the plaintiffs-appellees-cross-appellants.

John G. Donhoff, Jr., Deputy Attorney General, San Francisco, California, for the defendants-appellants-cross-appellees.

OPINION

HUG, Circuit Judge:

California state prison officials appeal the district court's order modifying a 1980 consent decree between prison officials and a class of individually named inmates sentenced to death by the State of California and housed at San Quentin Prison. The inmates cross-appeal, opposing a particular section of the court's modification of the decree. We affirm.

I.

FACTS AND PROCEDURAL BACKGROUND

Maurice Thompson and other inmates sentenced to death ("Inmates") in the California State Prison at San Quentin commenced this civil rights action on July 6, 1979, against prison officials of San Quentin, alleging that the conditions under which the Inmates are housed at San Quentin constituted cruel and unusual punishment and a denial of due process under the federal and state Constitutions.

On October 23, 1980, the Inmates and prison officials at San Quentin entered into a consent decree. The decree required prison officials to take a number of corrective actions, including modifications in housing, treatment, and privileges of the Inmates. These modifications were to be implemented within a one-year period.[1]

When the decree was entered, all the Inmates were housed on Condemned Row I in the North Segregation Unit ("North Seg"). The increase in the population of prisoners sentenced

[1]The decree provides in pertinent part at Section ID:

> At the end of one year from the date of this decree, by which time the terms of this decree shall have been implemented, this action shall be dismissed in its entirety.

to death and renovations in North Seg necessitated the housing of the Inmates in non-North Seg areas.[2] While in non-North Seg areas, the Inmates lost certain rights and privileges afforded under the decree. Consequently, the Inmates asked the court to extend jurisdiction for six months and to hold the prison officials in contempt for not abiding by the decree.

In January of 1982, the court granted the Inmates' motion to extend its jurisdiction for six months, to give the prison officials time to satisfy the provisions of the decree. The court further held that if the prison officials substantially complied with the decree before the expiration of the six months, that no further extension of jurisdiction would be granted.

In June 1982, the prison officials had yet to satisfy the decree's provisions. The court, however, declined to grant the Inmates' motion to hold prison officials in contempt, finding that prison officials had been reasonably diligent in attempting to comply and that substantial physical and security differences between North Seg and non-North Seg areas, to which the Inmates had been moved, made it impossible for prison officials to comply with the decree. *Thompson v. Enomoto*, 542 F. Supp. 768, 770 (N.D. Cal. 1982). Accordingly, the court held that modification of the decree was necessary, and directed the parties to negotiate to modify the decree. *Id.* The court also directed the parties to appear before the court upon completion of negotiations, for the court's approval of the proposed modifications. *Id.*

The parties failed to reach an agreement regarding modifications. The Inmates, frustrated by continuing noncompliance, filed a motion in the district court on January 11, 1985, requesting appointment of a special master pursuant to Fed. R. Civ. P. 53, to assure compliance with the decree.[3]

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[2]The initial inmate overflow was transferred to the Adjustment Center.

[3]Prior to the Inmates' request for a special master, the Inmates had filed another contempt motion against the prison officials. The district court, in March of 1983, found the prison in contempt for violating the visiting rights provisions of the decree with respect to the Inmates in North Seg and the Adjustment Center.

The decree established procedures for the resolution of any disputes regarding compliance:

> [I]n the event of a dispute, ... with respect to whether terms of the decree have been reasonably complied with, any party may present such dispute to this court which will then establish procedures for the resolution of such dispute and may thereafter issue such orders as it deems necessary to assure compliance.

Accordingly, the court granted the Inmates' motion and, on March 25, 1985, entered an order appointing Robert R. Riggs as "Monitor." Accompanying this order, the court filed an Order of Reference, detailing the Monitor's responsibilities, authority, and compensation.[4] The order provided:

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[4]In pertinent part, the Order of Reference states that:

> IT IS FURTHER HEREBY ORDERED that the powers of the Monitor are and shall be the following:
>
> 1. To enter, at any reasonable time, with or without advance notice, any part of any facility affected by the Consent Decree.
>
> 2. To interview, on a confidential basis or otherwise, any person, including any correctional staff member or inmate, affected by the Consent Decree. Defendants shall provide suitable facilities and arrangements for the conduct of such interviews under conditions satisfactory to the Monitor.
>
> 3. To attend institutional meetings and proceedings required by the Consent Decree.
>
> 4. To obtain any document in the possession of any party relevant to the state of compliance with the Consent Decree or the state of conditions of confinement in any unit which presently houses or may in the future house condemned prisoners.
>
> 5. To require the posting of notices in any part of any facility [sic] affected by the Consent Decree, in such number and form as the Monitor may direct.
>
> 6. To convene hearings concerning any matter relating to the state of compliance with the Consent Decree or the state of condi-

> IT IS FURTHER HEREBY ORDERED that any report of the Monitor shall be adopted as the findings of fact and conclusions of law of the Court unless, within ten days after being served with notice of the filing of the report, either side moves to reject or modify the report. The Court will entertain no objection to any report unless it is shown as a preliminary matter that an identical objection was submitted to the Monitor in the form of a specific written objection in accordance with the preceding paragraph of this Order. In accordance with Federal Rule of Civil Procedure 53(e)(2), the Court shall accept the Monitor's findings of fact unless clearly erroneous.

Order of Reference at 3-4.

The prison officials appealed the court's appointment of a Monitor. In our decision on appeal, we noted that the decree implicitly contemplates appointment of a special master by retaining authority to establish procedures for its compliance, and held that the order appointing a Monitor to supervise compliance with the decree was not an appealable interlocutory order. *Thompson v. Enomoto*, 815 F.2d 1323, 1327 (9th Cir. 1987). We explained in our decision that the Monitor's

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tions of confinement of condemned prisoners at San Quentin. To this end, the Monitor is empowered to require the attendance of witnesses, including both prisoners and employees of the California Department of Corrections, to make a record of the proceedings, and to exercise all other powers described in Federal Rule of Civil Procedure 53(c).

7. To retain from time to time experts, specialists, or other persons whose advice or testimony the Monitor deems necessary or desirable for the purpose of making findings concerning the conditions of confinement of condemned prisoners at San Quentin.

8. To recommend at any time modification or withdrawal of this Order of Reference. Order of Reference at 2-3 (N.D. Cal. 1980) (C-79-1630-SAW).

recommendations could be "effectively reviewed when the district court decide[d] whether to adopt the Monitor's recommendations." *Id.*

Monitor's First Report

On October 31, 1985, the Monitor filed his first report. The first report found that the prison officials were not in compliance with the decree in several respects. Nonetheless, the Monitor declined to recommend that the prison officials be held in contempt because he construed the decree to be limited in application only to those Inmates confined in North Seg.

The Inmates moved the district court to reject the latter aspect of the Monitor's First Report, which limited confinement of the decree to North Seg. The prison officials failed to submit written opposition to the first report or the Inmates' motion.

On December 18, 1986, the district court entered an order granting the Inmates' motion and directing that the decree should be construed as applying to all the prisoners sentenced to death at San Quentin wherever housed.

Prison officials filed a motion for reconsideration, which was denied on January 29, 1987. The court based its denial not only on the language of the decree, but also on the prison officials' post-decree conduct and on its previous orders.

The prison officials did not appeal the court's denial of the motion for reconsideration or the order adopting the Monitor's report. Under our circuit court decision, this was the appropriate time to appeal.

Monitor's Second Report

In early 1987, prison officials moved the Monitor to modify the decree to allow them greater latitude to handcuff the

Inmates during movement off the tier. On July 27, 1987, the Monitor denied the prison officials' motion in his second report. The Monitor also noted that the question of the prison officials' compliance with the decree as to the Inmates, other than those housed in North Seg, would be discussed further in the next report.

Shortly thereafter, the parties requested that the Monitor suspend further investigation so that they could again attempt to modify the decree by agreement. On March 10, 1988, the parties stipulated to a modification of the decree, by which prison officials agreed to provide free weights for outside exercising and the Inmates agreed to afford prison officials latitude to restrain them during movement off the tier.

The Inmates also agreed at this time to seek dismissal of a separate state court action by an individual inmate challenging prison officials' policies regarding access to electronic memory typewriters. In exchange, prison officials agreed to allow electronic typewriters with up to 4K random access built-in internal memory. In the stipulation relating to the separate state court action, the Inmates specifically reserved the right to challenge any of the prison officials' policies regarding inmate access to typewriters.

The district court approved the modification of the decree on March 17, 1988.

In May of 1988, the Inmates requested that the Monitor resume his investigation of the status of the prison officials' compliance with the decree because negotiations between the parties had again proved unproductive.

Monitor's Third Report

In November, 1988, the Monitor issued his third report, recommending that the district court order prison officials to

show cause why they should not be held in contempt for numerous instances of noncompliance with the decree.

At the time the third report was issued, all the Inmates had been transferred to the East Block at San Quentin, a separate structure in which the Inmates had not been confined previously. In his third report, the Monitor noted that the Inmates were "a class within the meaning of Rule 23 of the Federal Rules of Civil Procedure, consisting of all prisoners housed under sentence of death at San Quentin State Prison, wherever housed within that prison."

Prison officials did not file any objections to the Monitor's Third Report with the district court, and on December 15, 1988, the third report was adopted by the district court. Again, prison officials did not appeal.

Monitor's Fourth Report

Subsequently, prison officials filed a motion with the Monitor to vacate the decree on the grounds that the object of the decree had been fulfilled by "operation of law" because the Inmates' current conditions of confinement, while not in conformity with the decree, were nevertheless not in violation of the Constitution. In the alternative, prison officials moved to modify the decree to conform with the manner in which they were presently confining the Inmates.

After consideration of the prison officials' motions, seven days of hearings and extensive post-hearing briefing, the Monitor issued his fourth report on August 1, 1989. In his fourth report, the Monitor denied the prison officials' motions. However, he recommended that the decree be modified in various respects for application to the Inmates confined in the East Block. He also recommended that the decree be modified to withdraw certain equipment and privileges from that segment of the Inmate class known as "Grade B

condemned inmates."[5] Except as so modified, the Monitor determined that the prison officials' failure to comply with the decree was not justified, and he recommended that prison officials be ordered to comply or to be held in contempt. Pursuant to the Order of Reference, the Monitor's Fourth Report was submitted to the district court for adoption.

Prison officials moved the court to reject the Monitor's report and vacate or amend the decree. The Inmates sought to have the district court adopt the fourth report, except for modifications regarding Grade B condemned inmates.

On October 5, 1989, the district court entered its order adopting the Monitor's Fourth Report as submitted. On October 26, 1989, prison officials appealed. On November 7, 1989, the Inmates filed a cross-appeal with respect to the Grade B condemned inmate issues.[6] It is this appeal and cross-appeal of the order adopting the Monitor's Fourth Report that is before us for review.

II.

CONSENT DECREES

[1] Consent decrees have the attributes of both contracts and judicial acts. *Washington v. Penwell*, 700 F.2d 570, 573 (9th Cir. 1983). In construing consent decrees, courts use contract principles. *Id.* The contract law of the situs state applies. *Id.* (citing *Collins v. Thompson*, 679 F.2d 168, 170 (9th Cir. 1982)). In California, a contract is to be interpreted "to give

[5]For purposes of the decree, inmates sentenced to death are classified into one of three groups: Grade A, Grade B, and Walk-alones. Grade B condemned inmates have a high escape risk or violence potential or are serious disciplinary or management cases.

[6]On December 18, 1989, prison officials served a motion to dismiss the Inmates' cross-appeal for failure to describe the Inmates who were appealing with the specificity required by Fed. R. App. P. 3(c). On January 9, 1990, this court denied the prison officials' motion.

effect to the mutual intention of the parties as it existed at the time of contracting." Cal. Civ. Code § 1636. Interpretation begins with the contract's language which "is to govern . . . if the language is clear and explicit." *Id.* § 1638. Interpretation of a consent decree is a question of law reviewed *de novo*. *Keith v. Volpe*, 784 F.2d 1457, 1461 (9th Cir. 1986).

[2] A district court has the power to modify a consent decree if experience with the administration of the decree shows the need for modification in order to accomplish the primary goals of the decree. *Keith*, 784 F.2d at 1460. The court's decision to modify a consent decree is reviewed for abuse of discretion. *Washington*, 700 F.2d at 575.

III.

PRISON OFFICIALS' ARGUMENTS ON APPEAL

On appeal prison officials argue that: (1) the district court lacked jurisdiction to modify the decree after 1982; (2) the district court exceeded its jurisdiction in enforcing the consent decree outside of North Seg; and (3) the district court abused its discretion in denying prison officials' motion to vacate the decree on Eleventh Amendment grounds.

A. *Jurisdiction to Modify*

The prison officials argue that the district court lost its jurisdiction to modify the decree after the expiration of the district court's 1982 six-month extension of jurisdiction. We disagree.

It is clear that the district court had jurisdiction of the civil rights action brought by the Inmates, alleging that the conditions of the prison constituted cruel and unusual punishment and a denial of due process. The Inmates and the prison officials then entered into a consent decree on October 23, 1980

in settlement of the litigation. The terms of that decree provided:

> The Court shall retain jurisdiction for one year. During that year the provisions of this decree shall be implemented.
>
> . . . .
>
> At the end of one year from the date of this decree, by which time the terms of this decree shall have been implemented, this action shall be dismissed in its entirety. Provided, however, in the event of a dispute, during the one year from the date of this decree, with respect to whether the terms of this decree have been reasonably complied with, any party may present such dispute to this Court which will then establish procedures for the resolution of such dispute and may thereafter issue such orders as it deems necessary to assure compliance.

There had not been full implementation of the decree by the end of the year. The plaintiffs moved to extend jurisdiction for six months, and the defendants moved for a determination of the provisions of the decree and for modification. This resulted in the order of January 20, 1982. The decree was modified and jurisdiction was extended for six months. The order provided in pertinent part:

> IT IS HEREBY ORDERED that jurisdiction of the Court continue for six months from the date of this order so that the parties may satisfy the Court that the provisions of the Consent Decree have been fulfilled. *If it appears at or before the expiration* of said six months that there has been substantial compliance with the letter and the clear intendments of the Consent Decree, the Court intends that there

> shall thereafter be no further extension of jurisdiction.

E.R. 69-70 (emphasis added). No appeal was taken from this order.

The terms of the decree provided that the court could establish procedures for the resolution of disputes and thereafter could issue such orders as it deems necessary to assure compliance. This gave authority to the court to extend the continuing supervision of the court. The parties did not contest this extension but both actually sought relief under it. This resulted in the January 20, 1982 order, which extended the duration of the decree. However, that modification provided that there would be no further extensions of the decree "if at ... the expiration ... that there has been substantial compliance with the letter and the clear intendments of the Consent Decree."

During this time, the population of inmates under a death sentence increased to such an extent that they could no longer all be housed in North Seg. In order to avoid double celling of inmates, some of those inmates had to be transferred to another area of the prison. Thus, when the Inmates moved for contempt, the district judge noted that noncompliance was largely attributable to increases in the population of prisoners sentenced to death, not to the defendants' deliberate noncompliance. The court noted that there were substantial physical and security differences between the two prison areas and, thus, held that contempt was not warranted, but that modification of the consent decree was necessary. The court stated, "[r]ather it appearing to the Court that modification of the Decree will be necessary and that the parties are willing to attempt negotiations, this matter should be continued to allow the parties to negotiate necessary modifications of the Consent Decree." *Thompson v. Enomoto,* 542 F. Supp. 768, 770 (N.D. Cal. 1982). The court entered its order on June 29, 1982 directing the parties to negotiate modifications to the

decree. *Id.* Neither party appealed. Implicit in this order was the ruling that there had not been substantial compliance, that the jurisdiction to assure compliance was extended, and that the decree would be modified.

[3] It comes way too late in these proceedings to contend after eight years of negotiation and four Monitor's reports that the terms of the consent decree required termination of the court's jurisdiction to assure compliance with the consent decree. It was extended and neither party objected or appealed.

B. *Applying Decree to all the Inmates*

Basically, the prison officials' argument is that the district court incorrectly ruled that the consent decree was to apply to all the Inmates wherever housed. This argument may have had some merit eight years ago, but it comes far too late now. The basis for the June 29, 1982 order to negotiate modifications in the decree was that it was applicable to the Inmates who were housed in facilities other than North Seg. At that point, the prison officials could have objected to and appealed the court's order about the application of the decree to those Inmates not housed in North Seg. They did not do so.

Instead, prison officials continued to negotiate with the Inmates with regard to the modifications of the decree. Now, eight years after the *Thompson* decision ordering the parties to renegotiate, the prison officials argue that the decree is no longer in existence and if it is, it only applies to those Inmates in North Seg. If the decree had ceased to exist in 1982 or if the decree had been confined to North Seg Inmates, it would be nonsensical for the prison officials to have attempted to negotiate modifications to the decree for eight years for the Inmates housed outside North Seg.

Even if it were to be argued that the order to negotiate on this question was not an appealable order, a second clear

opportunity to appeal this issue was explicitly raised after the Monitor filed his first report. He interpreted the decree to be limited to those Inmates confined in North Seg. The district court rejected that construction and in its order of December 18, 1986 held that the decree should be interpreted as applying to all the Inmates wherever housed. In his order of January 29, 1987, denying reconsideration of that order, he reemphasized that construction. Neither order was appealed.

In the district court's order of December 18, 1986 and its order of January 29, 1987, the district court explicitly considered the scope of the decree and determined that the decree applied to all the Inmates sentenced to death situated at San Quentin, wherever they were housed. Accordingly, the district court held that under the doctrine of law of the case, the extended coverage issue had already been decided. Since prison officials did not introduce substantially different evidence or any new and controlling authority when appealing the Monitor's Fourth Report, the court reaffirmed its prior ruling.

[4] We agree with the district court. The modification of the decree to extend to all the Inmates sentenced to death wherever housed has been in effect for years. It would be nonsensical to permit the prison officials to appeal the issue of the applicability of the decree to the Inmates outside of North Seg at this juncture of the case. The prison officials had their opportunity to appeal the modification of the decree when the court ordered them to negotiate and when the court accepted the Monitor's First Report and modified the decree to extend to the Inmates wherever housed. This is the Monitor's Fourth Report. We will not allow prison officials four bites at the apple. Under the doctrine of law of the case, the court's interpretation of the decree must stand. *See Milgard Tempering, Inc. v. Selas Corp. of Am.*, 902 F.2d 703, 715-16 (9th Cir. 1990) (explaining doctrine of law of the case).

The prison officials also assert that the district court could not modify the consent decree to extend to non-North Seg

areas according to the principles of *Firefighters Local 1784 v. Stotts*, 467 U.S. 561 (1984). In *Firefighters*, the Supreme Court considered whether a district court had the power to modify a Title VII consent decree which was silent about the issue of layoffs. The Court held that the disputed injunction, which barred layoffs of black firefighters and did not follow the bona fide seniority system plan, was not an order in aid of a valid interpretation of the decree or the decree's purpose. *Id.* at 573-76.

[5] We do not find the prison officials' reliance on *Firefighters* to be persuasive. *Firefighters* held that a district court lacks the power to modify a consent decree in a manner that would conflict with the special protection given bona fide seniority systems under Title VII. *Id.* at 575. In *Firefighters*, the district court's expansive interpretation of the decree directly conflicted with a bona fide seniority system. Bona fide seniority systems are specifically protected under Title VII. Therefore, the decree, as interpreted by the district court in *Firefighters*, conflicted with Title VII, the statute which the decree initially sought to implement. The interpretation of the decree in this case does not conflict with any statutory or constitutional requirements.

C. *Eleventh Amendment Bar*

Prison officials also moved to vacate the decree on Eleventh Amendment grounds, arguing that the decree was barred by the Eleventh Amendment because it no longer vindicated any substantive federal rights.

[6] The action, when brought, was against state officials, not the state, to vindicate constitutional rights under the Eighth and Fourteenth Amendments. This is not barred by the Eleventh Amendment. *Ex parte Young*, 209 U.S. 123 (1908). A settlement of that litigation was reached and a consent decree entered. We are now dealing with a consent decree in an action against state officials to vindicate constitutional rights.

The court subsequently interpreted the application of that decree. The consent decree, as interpreted by the court, presents no Eleventh Amendment problem.

IV.

INMATES' ARGUMENTS ON APPEAL

We now address the Inmates' cross-appeal. On their cross-appeal, the Inmates argue that the court abused its discretion in modifying the decree to deprive Grade B condemned inmates of various benefits they previously enjoyed. The Monitor's Fourth Report recommended that the decree be modified to take away the following items from Grade B condemned inmates:

(1) yard equipment;

(2) cell equipment and personal property;

(3) canteen items; and

(4) access to tier telephones.

While the Monitor conceded that virtually any item could be used by an inmate in a manner inconsistent with prison security, he also found that here the circumstances did warrant relieving prison officials of the obligations of the decree to provide this equipment to Grade B condemned inmates.

[7] The court reviewed the Monitor's report and found that the report reflected a "very thorough review and consideration of all the evidence and relevant circumstances."[7] Fur-

[7]According to the Inmates, the Monitor's recommendations for modifying the decree as to the Grade B provisions at issue were based on two grounds: (1) that the modification would impose the same conditions on Grade B condemned inmates as on noncondemned segregated inmates; (2)

ther, the court held that the report gave extensive consideration to each of the provisions of the decree that prison officials requested be modified and made specific recommendations for each provision as to whether modifying the provision would be equitable. Moreover, the court determined that the Monitor applied the proper legal standard for determining whether modification of the decree in this respect was appropriate. We conclude that the court did not abuse its discretion in granting such modifications.

AFFIRMED.

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that other modifications had been approved by the district court on earlier occasions. To the Inmates, these grounds for modification were impermissible.

While the Monitor did mention both of these grounds, the record shows that he based his recommendation to modify on specific facts and evidence. He did not, as the Inmates argue, base his decision merely on the two grounds asserted above.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MAURICE S. THOMPSON; CHARLES A. GREEN; JOHN GZIKOWSKI; KEITH D. WILLIAMS; RONALD E. LANPHEAR; CHOL SOO LEE; ANDREW E. ROBERTSON, individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

v.

JIRO J. ENOMOTO (former Director, California Department of Corrections; current Director James Rowland); GEORGE SUMNER, Warden (former Warden, San Quentin State Prison; current Warden Daniel Vasquez),

Defendants-Appellants.

No. 89-16335

D.C. No. CV-79-1630-SAW

MAURICE S. THOMPSON; CHARLES A. GREEN; JOHN GZIKOWSKI; KEITH D. WILLIAMS; RONALD E. LANPHEAR; CHOL SOO LEE; ANDREW E. ROBERTSON, individually and on behalf of all others similarly situated,

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Defendants-Appellees.

No. 89-16420

D.C. No. CV-79-1630-SAW

ORDER

Appeal from the United States District Court for the Northern District of California

Before: HUG, SKOPIL, and SCHROEDER, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Hug and Schroeder have voted to reject the suggestion for a rehearing en banc, and Judge Skopil has recommended rejection of the suggestion.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JIRO J. ENOMOTO, et al.,

Appellants,

v.

MAURICE S. THOMPSON, et al.,

Appellees.

No. 89-90002

D.C. No. C-79-1630 SAW

ORDER

Before: KOELSCH, HUG, and HALL, Circuit Judges

Appellants' motion for stay pending appeal is GRANTED until further notice of this court. The clerk shall set an expedited briefing schedule and shall set the case for hearing as soon as practicable.

NOT FOR PUBLICATION

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D.C. No. CV-79-1630-SAW

ORDER

Appeal from the United States District Court for the Northern District of California

Before: HUG, Circuit Judge.

Upon due consideration of defendants-appellants' motion for stay of mandate, filed January 15, 1991, pending application to the United States Supreme Court for a writ of certiorari, pursuant to Fed. R. App. P. 41 and Circuit Rule 41-1, is hereby GRANTED.

NOT FOR PUBLICATION

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Defendants-Appellees.

No. 89-16420

D.C. No. CV-79-1630-SAW

ORDER

Appeal from the United States District Court for the Northern District of California

Before: HUG, Circuit Judge.

Upon due consideration of defendants-appellants' motion for an extension of the stay of mandate, filed February 22, 1991, is hereby GRANTED, and the stay is extended to March 15, 1991.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MAURICE S. THOMPSON, et al.,

Plaintiffs,

v.

JIRO J. ENOMOTO, et al.,

Defendants.

No. C-79-1630 SAW

MEMORANDUM AND ORDER

Plaintiffs filed this action on July 6, 1979, alleging that the conditions under which condemned inmates are housed at the California State Prison at San Quentin constituted cruel and unusual punishment and a denial of due process under the federal and state constitutions. The parties entered into a Consent Decree on October 23, 1980.

The Consent Decree required defendants to take a number of corrective actions, including modifications in housing, treatment, and privileges of condemned prisoners. The Decree created the following classification system for condemned prisoners: Grade A (inmates without a high violence or escape potential), Grade B (inmates with a

high violence or escape potential), and Walk-alones (inmates who should be Grade A, but who are unacceptable to the Grade A population). Consent Decree, October 23, 1980.

When the Decree was entered, all condemned prisoners were housed in Condemned Row I in North Segregation (North Seg). A subsequent increase in the number of condemned prisoners, and the ongoing renovation of North Seg, made it impossible to house all of them in North Seg. Condemned prisoners transferred to other areas lost certain rights and privileges accorded under the Decree.

In June 1982, the Court stated that it appeared modification of the Decree would be necessary: substantial physical and security differences between North Seg and the housing units to which condemned prisoners had been moved made it impossible for defendants to comply with the Decree. *Thompson v. Enomoto*, 542 F.Supp. 768, 770 (N.D.Cal. 1982). The Court directed the parties to attempt to negotiate an appropriate modification of the Decree. *Id.* The Fourth Report of the Monitor, now before the Court on the parties' motions, is the fruit of that statement, seven years delayed, because the parties have tried and failed to reach agreement.

Defendants now move to reject the Fourth Report of the Monitor, and to vacate the Consent Decree or to modify it to ratify existing conditions in housing units other than North Seg. In the alternative, defendants object to, and propose a number of modifications to the Monitor's Report.

Plaintiffs request that the Court reject the Fourth Report of the Monitor in part, amend the same, and adopt the amended Report as the order of the Court. Plaintiffs also move to strike the McMahon and Donhoff declarations.

I.

Defendants move to vacate the Consent Decree on two grounds. First, they assert that the Decree must be vacated under the eleventh amendment to the United States Constitution because the Decree no longer serves to vindicate any substantial federal right. Second, they argue that the Decree was limited to condemned inmates living in North Seg, and so cannot be extended to embrace condemned inmates living in other housing units in San Quentin.

A. The Eleventh Amendment.

The eleventh amendment's bar to federal court jurisdiction does not apply to suits seeking prospective relief against state officials for acts in violation of federal law. *Ex parte Young*, 209 U.S. 123 (1908); *Edelman v. Jordan*, 415 U.S. 651 (1974). In *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), the Supreme Court held that the *Ex parte Young* doctrine does not extend to suits challenging the action of state officials on state law grounds. Defendants rely on a Ninth Circuit case, *Washington v. Penwall*, 700 F.2d 570 (9th Cir. 1983),

to argue that the Consent Decree no longer addresses any violations of federal law and so should be vacated under *Pennhurst*.

In *Penwell*, the district court vacated a provision of a consent decree that required the State of Oregon to provide plaintiffs' counsel with sufficient funds to insure adequate general legal services to inmates.[1] *Penwell*, 700 F.2d at 571. The Ninth Circuit affirmed, finding that this provision of the consent decree was not compelled by any federal constitutional or statutory law. *Id.* at 574.

Unlike the provision of the consent decree at issue in *Penwell*, the Consent Decree provisions at issue here address alleged violations of federal constitutional law. Defendants contend that plaintiffs' current conditions of confinement exceed all constitutional requirements under the eighth amendment. The premise of much of the relief contained in the Consent Decree, however, is to protect condemned prisoners from arbitrary deprivation of their fourteenth amendment liberty interest in freedom from minimum privilege confinement. *See* Fourth Report of the Monitor at 13-16.

The Consent Decree divides the condemned inmates into three classes in order to address plaintiffs' fourteenth amendment concerns. *See id.* at 13-14. Most of its provisions are directed at defining a form of custody for Grade A condemned inmates which emulates, as far as possible, the daily activities available to San Quentin's

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[1] The consent decree also required accessible prison law libraries and trained prisoner paralegals. *Penwell*, 700 F.2d at 571.

general population inmates while preserving the separation between general population inmates and the condemned. This legal premise underlying the Consent Decree has not changed, and plaintiffs continue to have a colorable claim under the fourteenth amendment. *See Toussaint v. McCarthy*, 801 F.2d 1080, 1098 (9th Cir. 1986) (finding liberty interest in freedom from arbitrary segregation to be created by same administrative regulations at issue here). Since the Consent Decree has a continuing basis in federal law, the eleventh amendment does not require the Court to vacate the Consent Decree.

B. The Scope of the Decree.

Defendants also argue that the Court lacks jurisdiction to apply the Consent Decree to condemned inmates living in housing units other than North Seg. The jurisdiction of the Court extends to all matters necessary to enforce the Consent Decree. 28 U.S.C. § 1331; *Hutto v. Finney*, 437 U.S. 678, 687 & n.9 (1978). When the Consent Decree was entered, it applied only to the North Seg housing unit because all condemned prisoners were then housed in North Seg. *See* Consent Decree at 3. When a dramatic increase in the number of condemned prisoners necessitated the housing of condemned prisoners in units other than North Seg, an issue of interpretation arose: Did the Consent Decree apply to treatment of all condemned inmates, or was its application limited to those housed in North Seg?

In its Order of December 18, 1986, and Order of

January 29, 1987, the Court considerably and at great length the issue of the scope of the Consent Decree.[2/] It determined that the Decree applies to all condemned prisoners at San Quentin. Under the doctrine of law of the case, a decision on an issue of law made at one state of a case should be followed unless there is substantially different evidence at a subsequent trial, new controlling authority, or the prior decision was clearly erroneous and would result in injustice. *Handi Investment Co. v. Mobil Oil Corp.*, 653 F.2d 391, 392 (9th Cir. 1981). No such change in fact or law that would render the Court's decision erroneous or unjust has occurred since its ruling. The Court's ruling, therefore, stands.

II.

Defendants have not responded to plaintiffs' motion to strike. The Order of Reference provides that all matters regarding a proposed Report be presented to the Monitor before they are presented to the Court. At the close of the evidentiary hearing in this matter,

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[2] The First Report of the Monitor concluded that the ConsentDecree should be interpreted to apply only in North Seg. First Report of the Monitor, October 31, 1986, at 8-14. The Court vacated this portion of the First Report and directed the Monitor to construe the Consent Decree "as applying to all segregated condemned inmates at San Quentin, wherever housed." Order of December 18, 1986. Defendants moved for reconsideration of this ruling. The Court, after exercising discretion to reconsider the merits, denied defendants' motion. Order of January 29, 1987.

defendants rested and offered no further evidence in support of their position. The Monitor indicated that the record was closed. The McMahon and Donhoff declarations and the material they contain were not presented to the Monitor.

Defendants had an opportunity to submit the declarations to the Monitor, but failed to do so. The Court should not be put in the position of considering evidence that was not before the Monitor. *Toussaint v. Rowland*, 711 F.Supp. 536, 537 (N.D.Cal. 1989). Plaintiffs' Motion to strike is granted.

III.

The Court appointed the Monitor as a Special Master pursuant to Federal Rule of Civil Procedure 53. His findings of fact should be reversed only if clearly erroneous. *Crystal Palace Gambling Hall, Inc. v. Mark Twain Industries, Inc.*, 817 F.2d 1361, 1364 (9th Cir. 1987); Fed. R. Civ. P. 53(e)(2).

A. Plaintiffs' Motion to Modify.

Plaintiffs contend that the Monitor, with respect to portions of the Report concerning Grade B inmates, applied an insufficiently stringent standard to determine whether modification of the Decree was necessary, and thus improperly recommended modification to relieve defendants of several of their obligations under the Decree.

The Court disagrees with plaintiffs' contentions. the Court finds that the Monitor applied the proper legal standard for determining whether modification of the Decree is appropriate. Further, the Monitor's Report reflects a very thorough review and consideration of all the evidence and relevant circumstances.

The Monitor in the Report noted that this Court has already concluded that "differences between North Seg and five-tier units at San Quentin make it impossible for defendants to observe the literal terms of the Decree in five-tier units, . . . [and] that modification of the Decree would be necessary to accommodate the housing of condemned inmates in five tier units." Fourth Report of the Monitor at 10 (citing *Thompson*, 542 F.Supp. at 770). Given the changed circumstances, the Report gives extensive consideration to each of the provisions of the Decree which defendants request should be modified. The Report makes specific recommendations for each provision as to whether modifying the provision would be equitable. The Court concludes that the Report properly distinguishes between those requests for modification that should be granted and those that should not be granted.

B. Defendants' Motion to Modify.

Defendants object to each of the Monitor's recommendations that requires defendants to depart from current practice in order to comply with provisions of the

Consent Decree or, in two instances,[3] to comply with modifications to the Decree. The Court, having carefully reviewed each objection, agrees with the Monitor's findings of fact, conclusions of law, and recommendations as to each of these issues.

Accordingly,

IT IS HEREBY ORDERED that:

1. Plaintiffs' motion to strike the declarations of Robert McMahon and John G. Donhoff is granted.

2. Plaintiffs' motion to reject the Fourth Report of the Monitor in part, to amend the same, and to adopt the Report as amended is denied.

3. Defendants' motion to vacate or to modify the Consent Decree and to reject the Fourth Report of the Monitor; or, in the alternative, to amend the Report and adopt the Report as amended is denied.

4. The time period provided in the Fourth Report of the Monitor within which defendants are directed to file proposals with the Court and submit the same to the Monitor is extended from October 1, 1989 to November 1, 1989.

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[3] These modifications relate to access to a law library, *see* Fourth Report of the Monitor at 51-54, and noise relief. *See id.* at 55-57.

5. In all other respects, the Fourth Report of the Monitor is adopted as the Order of the Court.

Dated: October 5, 1989

STANLEY A. WEIGEL [Signed]

Judge

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MAURICE S. THOMPSON, et al, Plaintiffs,	)	No. C 79-1630 SAW (Monitor)
vs.	)	
JIRO J. ENOMOTO, et al., Defendants.	)	FOURTH REPORT OF THE MONITOR

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I.
INTRODUCTION

On November 1, 1988, the Third Report of the Monitor was filed in this case. That Report recommended that the Court order defendants to appear before the Monitor and show cause, if any, why defendants should not be held in contempt for each of eighteen instances of failure to comply with the Consent Decree herein. This recommendation was not appealed, and became an order of Court.

Defendants did appear before the Monitor on January 17, 1989. At that time, defendants were afforded a full opportunity to present all of the evidence which they believed relevant to the issue of contempt of court. They, and plaintiffs, presented testimony set forth in 1,521 pages of transcript, and approximately 75 documentary exhibits. In addition, the issues pertinent to contempt have been exhaustively briefed by both sides.

Defendants have not altered most of their practices which fail to comply with the terms of the Decree. Rather, with several minor exceptions the reason they say the Court should not hold them in contempt is that the Court should not enforce the requirements of the Consent Decree. Defendants' primary position in this regard is that the Decree should be vacated. In the alternative, defendants ask the Court to modify the Decree to eliminate each provision that defendants are not obeying.

Defendants have not proposed any exact form of such modification.

Plaintiffs oppose any change in the Decree that would relieve defendants of the duty to obey the provisions that the Third Report found defendants are not obeying. Plaintiffs maintain that defendants agreed to the terms of the Decree, and that defendants have demonstrated no changed circumstance that was not foreseeable at the time the Decree was entered that justifies changing any of the Decree's provisions. Therefore, they argue, defendants should not be relieved of the obligation to perform fully the agreement they made voluntarily. Plaintiffs urge the Court to find defendants in contempt of court, and to impose appropriate coercive sanctions.

The Third Report also ordered both sides to show cause, if any, why the Consent Decree should not be modified to add provisions dealing with noise and with access to courts. Both of these problems are included within the scope of the Judgment of Permanent Injunction in the case of *Toussaint v. Rowland*, No. C 73-1422 SAW (N.D. Cal.), which applies to the same facilities as the Consent Decree. Plaintiffs presented evidence that such modifications are needed, and urge the Court to modify the Decree as proposed in the Third Report. Defendants oppose these modifications.

II.
PRINCIPLES GOVERNING REQUESTS FOR MODIFICATION OR TERMINATION OF CONSENT DECREES

The standard to be used in evaluating requests for modification of consent decrees in institutional reform litigation has become a topic of many judicial opinions and much scholarly debate. *See generally*, Note, *The Modification of Consent Decrees In Institutional Reform Litigation*, 99 Harv. L. Rev. 1020 (1986). Often, the development of law in this area is described as a progression beginning with the Supreme Court's decision in *United States v. Swift & Co.*, 286 U.S. 106 (1932). *See, e. g., Note, supra, at 1023; Kozlowski v. Coughlin*, 871 F.2d 241, 246-47 (2d Cir. 1989); *Keith v. Volpe*, 784 F.2d 1457, 1460 (9th Cir. 1986).

In *Swift* the Supreme Court stated that the district court has power to modify the terms of a consent decree. 286 U.S. at 114-15. However, it reversed the modification of an antitrust consent decree which the district court had granted in that case. After reviewing the record, the Court concluded that the defendants who sought modification were not "suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression." *Id.* at 119. The Court accordingly overruled the district court's grant of a modification, explaining that "nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of

litigation with the consent of all concerned." *Id.*

Swift has been cited to show that requests for modification of consent decrees should be viewed with extreme disfavor, out of respect for the finality of the "judgment" to which the parties agreed. *E. g., Mayberry v. Maroney,* 558 F.2d 1159, 1163 (3rd Cir. 1977); *see also, United States Steel Corp. v. Fraternal Association,* 601 F.2d 1269, 1274 (3d Cir. 1979). Courts adopting this view have placed little emphasis on the *Swift* Court's concurrent admonition that an unyielding "contract" oriented approach to decree modification is not appropriate.

Other courts, including the Supreme Court, have recognized that the concluding words used by Justice Cardozo to announce the Court's holding in *Swift* must be understood in the context in which they were rendered. *United States v. United Shoe Machinery Corp.,* 391 U.S. 244, 248-49 (1968); *see also, Keith v. Volpe,* 784 F.2d 1457, 1460 (9th Cir. 1986). Thus, where the United States sought modification of a judicial antitrust decree, on the basis of evidence that the relief originally granted by the district court had not achieved its intended purpose of ending an illegal monopoly, the Supreme Court held that it was error to deny modification in reliance on *Swift*. *United Shoe*, 391 U.S. at 248-49. The Court held that "based upon the specific facts and circumstances" that were presented, the district court should have granted the Government's petition for modification of the decree. Id. at 249-52.

Consent decrees entered in so-called "institutional reform" cases present equitable considerations materially

different from those presented in antitrust cases such as *Swift* and *United Shoe*. The values to be balanced in framing an antitrust remedy are, typically, economic hardship to the defendants versus the public benefits of non-monopolistic markets. In institutional cases, the competing values are, typically, the security of an institution, its inmates, employees and the public versus the residual rights of persons lawfully committed to the institution for incarceration. In this context, the public interest component of the institutional defendant's duty makes it even less appropriate than in antitrust cases to interpret and enforce a consent decree as if it were strictly a "bargain" between private parties. *See Alliance to End Repression v. City of Chicago*, 742 F.2d 1007, 1014 (7th Cir. 1984) (en banc) (proferred interpretation of consent decree governing FBI procedures rejected where it would have entailed "trifling with the public safety of the people of Chicago"); *Duran v. Elrod*, 760 F.2d 756, 762 (7th Cir. 1985); *New York State Association for Retarded Children v. Carey*, 706 F.2d 956, 969 (2nd Cir. 1983).

Also, when the institutional defendants are state officials, federalism concerns affect the equity of preserving, or modifying, a federal court consent decree. *See, e. g., Washington v. Penwell*, 700 F.2d 570, 574 (9th Cir. 1983) (consent decree requiring perpetual funding by state of prisoner legal services organization modified to avoid causing federal court to violate state's sovereign immunity). In the words of Judge Posner:

The Constitution does not speak with

> precision to the issue of prison conditions (that is an under-statement); federal judges know little about the management of prisons; managerial judgments generally are the province of other branches of government than the judicial; and it is unseemly for federal courts to tell a state . . . how to run its prison system.

Duran v. Elrod, 760 F.2d at 759.

Out of concern for federalist precepts, the United States Court of Appeals for the Ninth Circuit has time and again reiterated that remedies framed by federal courts in state institutional litigation must be narrowly tailored to do no more than cure violations of federal law. *E. g., Toussaint v. McCarthy,* 801 F.2d 1080, 1087 (9th Cir. 1986); *Hoptowit v. Ray,* 682 F.2d 1237, 1246 (9th Cir. 1982); *Wright v. Rushen,* 642 F.2d 1129, 1133 (9th Cir. 1981). The fact that the Court's authority to supervise and enforce a remedy stems from a consent decree, instead of a judgment entered after trial, does not permit the Court to disregard this fundamental constraint on the exercise of federal judicial authority.

With these considerations in mind, the United States Court of Appeals for the Second Circuit has articulated an "emerging" standard by which applications to modify a consent decree running against state institutional defendants must be "viewed with generosity". *New York State Association for Retarded Children v. Carey,* 706 F.2d 956, 967-71 (2d Cir. 1983). While some courts,

including the Ninth Circuit, have endorsed a "modern standard" of flexible modification based on *Carey, see Keith v. Volpe*, 784 F.2d 1457, 1460-61 (9th Cir. 1986); *Plyler v. Evatt*, 846 F.2d 208, 211-12 (4th Cir. 1988); *Newman v. Graddick*, 740 F.2d 1513, 1520-21 (11th Cir. 1984), others have gone to great lengths to try to avoid choosing between the "*Carey*" and "*Swift*" standards. *E. g., Ruiz v. Lynaugh*, 811 F.2d 856, 861 (5th Cir. 1987) (over dissent urging express adoption of "flexible approach").

Swift, Carey, and other well-reasoned decree modification cases are not truly difficult to reconcile. *See, e. g., Badgley v. Santacroce,* 853 F.2d 50, 52 (2d Cir. 1988) ("as with many legal issues, the appropriate standard can better be distilled by examining what was decided in the cited cases than by characterizing the decisions in generalized terms such as 'strict' and 'flexible'"). Stripped of excess verbiage, the decision in each of the seminal cases ultimately turned upon the court's judgment as to whether, under all of the specific "facts and circumstances" presented, the lower court acted within its equitable discretion in granting, or denying, modification to the party so moving. *Swift*, 286 U. S. at 115; *United Shoe,* 391 U.S. at 248; *System Federation*, 364 U.S. at 651-53; *Keith v. Volpe*, 784 F.2d at 1461; *Carey*, 706 F.2d at 967; *Kozlowski v. Coughlin,* 871 F.2d at 248-49. This standard should be used here to assess defendants' request to vacate the Decree, defendants' alternative request to modify the Decree, and plaintiffs' request for additions to the Decree.

III.
GENERAL FACTS AND CIRCUMSTANCES OF THIS CASE WHICH FAVOR THE EQUITY OF MODIFICATION

Several aspects of the history and posture of this case demand a liberal approach to modification of the Consent Decree.

A. The Court Has Already Exercised Discretion to Modify the Decree

The Court has already modified the original "bargain" of the parties in several respects. *E. g.*, Stipulation and Order, filed March 17, 1988 (modifying provisions relating to handcuffing of inmates, and adding provisions relating to typewriters and exercise yard equipment); Order filed October 29, 1986 (adding emergency suspension provision); Order of March 17, 1983 (Reported in Reporter's Transcript) (adding requirement of priority for condemned inmates in use of North Segregation portion of North Block); Order filed January 20, 1982 (modifying portions of the Decree to exclude application to Grade B condemned inmates). None of these modifications were based on a preliminary showing of "extreme and unexpected hardship" which some courts have deemed required by *Swift*.

B. The Court Has Extended the Period of Active Supervision Specified in the Original Decree

The original Decree as entered October 23, 1980 contained the following "Procedural" text:

> A. The Court shall retain jurisdiction for one year. During that year the provisions of this decree shall be implemented.
>
> . . . .
>
> D. At the end of one year from the date of this decree, by which time the terms of this decree shall have been implemented, this action shall be dismissed in its entirety. Provided, however, in the event of a dispute, during the one year from the date of this decree, with respect to whether the terms of this decree have been reasonably complied with, any party may present such dispute to this Court which will then establish procedures for the resolution of such dispute and may thereafter issue such orders as it deems necessary to assure compliance.

Continual disputes relating to compliance with and "implementation" of the Decree have arisen since the

Decree was entered. In response, the Court has repeatedly declined to end its continuing active supervision of the Decree. *E. g.*, Order of Jan. 20, 1982; Order of March 17, 1983 (Reported in Reporter's Transcript). It would make little sense for the Court, having continued its active supervision of the case far beyond the period stated in the Decree, to reject a well-founded request for modification.

C. The Original Decree Envisioned Application to Condemned Prisoners Housed in the North Segregation Unit; All Condemned Prisoners Are Now Housed in Other Units

Part II of the original Consent Decree addressed the housing of condemned prisoners in the North Segregation Unit ("North Seg") of San Quentin. The housing of condemned prisoners in units other than North Seg is not mentioned in the Decree. Since entry of the Decree, an increase in the number of California's condemned prisoners, from 44 in the year of the Decree to 249 as of the end of 1988, has made it impossible to house all condemned prisoners in North Seg. For this reason, and because North Seg is currently undergoing renovation, all condemned prisoners are now housed in facilities other than North Seg. To preclude modification of detailed provisions agreed upon when all condemned prisoners were housed in North Seg solely because defendants conceivably could have foreseen the subsequent rise in the number of condemned prisoners

would deny the force of events in a way *Swift* condemned. *See* 286 U.S. at 115.

D. The Court Has Already Expressed Its View That Modification Based On the Need to Use Facilities Other Than North Seg to House Condemned Prisoners May Be Necessary

In fact, the Court has already expressed its view that modification to the Decree based on the type of situation now presented would be appropriate. In a memorandum opinion dated June 29, 1982, the Court stated that, because substantial physical and security differences between North Seg and five-tier units at San Quentin make it impossible for defendants to observe the literal terms of the Decree in five-tier units, it appeared to the Court that modification of the Decree would be necessary to accommodate the housing of condemned inmates in five-tier units. *Thompson v. Enomoto,* 542 F. Supp. 768, 770 (N.D. Cal. 1982). The present Report is the fruit of that statement, seven years delayed because the parties have tried and failed to reach agreement.

IV.

FINDINGS OF FACT AND CONCLUSIONS OF LAW: DEFENDANTS' REQUEST TO VACATE THE CONSENT DECREE

Before addressing the merits of any proposed modification to the Decree, the Court must first consider defendants' request that the Consent Decree be vacated in its entirety. The primary basis for this request is defendants' assertion that the relief contained within the Decree is not tailored to prevent any colorable violation of federal law.

In determining whether the Consent Decree should be vacated or modified, it is not necessary for the Court to determine whether plaintiffs were entitled to the precise form of relief specified in the Decree. After all, defendants voluntarily agreed to that form of relief. As the court observed in *Duran v. Elrod,* 760 F.2d 756, 760 (7th Cir. 1985), a party often gives up more in a consent decree than it is legally obligated to give up, usually in exchange for something. *See also, Kozlowski v. Coughlin,* 871 F.2d at 245. So long as the Consent Decree conformed to a plausible interpretation of the law, equity does not require vacating or modifying the Decree. *See Fortin v. Commissioner,* 692 F.2d 790, 800 (1st Cir. 1982).

Equity may require vacation or modification of a consent decree if, after entry of the decree, the law changes in a way that alters a fundamental premise

embodied in the decree. *See System Federation No. 91 v. Wright,* 364 U.S. 642, 648-51 (1961) (refusal to modify consent decree reversed where new federal statute brought terms of decree into conflict with federal law); *Carey,* 706 F.2d at 971 (modification request viewed with "especially great generosity" where, after consent decree entered, Supreme Court decision established that premise of relief embodied in decree was incorrect); *Theriault v. Smith,* 523 F.2d 601, 601-02 (1st Cir. 1975) (vacation of consent decree proper where intervening Supreme Court decision represented fundamental change in legal predicates of decree).

Defendants argue that the Consent Decree should be vacated because the Eighth Amendment does not support the relief embodied within the Decree. However, the Decree is not principally founded upon the Eighth Amendment. Consequently, the jurisprudence of the Eighth Amendment as expounded in recent cases, including *Peterkin v. Jeffes,* 855 F.2d 1021, 1023-33 (3d Cir. 1988), does not change the fundamental legal premises of the Decree.

Plaintiffs' complaint filed herein July 6, 1979 set forth two distinct claims for relief based on the federal Constitution. The first (paragraph 52) alleged that defendants were violating plaintiffs' right to be free from cruel and unusual punishment that is guaranteed by the Eighth Amendment as incorporated against the state by the Fourteenth Amendment, by (a) confining plaintiffs under a regimen which offends the basic concept of human dignity embodied in the Eighth Amendment, and

by (b) subjecting plaintiffs to such confinement without legitimate penal reasons. The second (paragraph 53) alleged that defendants were violating plaintiffs' right to due process of law, guaranteed by the Fourteenth Amendment, by arbitrarily depriving plaintiffs of their liberty interest in remaining in the general prison population. Plaintiffs alleged that this liberty interest is created by state administrative regulations (paragraph 19).

Although a few of the Decree's provisions do seek to define minimum standards of decency to be met by defendants in confining all condemned prisoners -- *i.e.*, requirements of the Eighth Amendment -- the bulk of the Decree pertains to the division of condemned inmates into three classes: "Grade A", Grade A "Walk-alone", and "Grade B". "Grade A" inmates are generally described as:

> Inmates without a high violence or escape potential who have demonstrated a good disciplinary free adjustment and are able to get along safely and peaceably with other inmates and staff.

"Grade B" inmates are generally described as:

> Inmates with a high escape or violence potential or who are serious disciplinary or management cases.

Grade A "Walk-alones"[4/] are generally described as:

> Those inmates who would otherwise be classified Grade A but who are unacceptable to the Grade A population.

The classification of particular inmates as Grade A and Grade B is to be done by San Quentin officials, using guidelines set forth in Part IV.D. of the Decree.

This "classification" is not, and never has been, required by the Eighth Amendment. In relation to the conceptual underpinnings of the Decree, it is a resolution of the second of the federal constitutional claims set forth in plaintiffs' complaint, which alleged the deprivation without due process of a liberty interest in freedom from segregation. Consistent with this premise, under the Decree Grade A condemned inmates are to be treated in certain enumerated respects as if they were not segregated. Most of the Decree is devoted to defining a form of custody for Grade A condemned inmates which emulates insofar as possible the daily activities available to San Quentin's general population inmates while preserving the separation between these inmates and San

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4. Part IV.A. of the Decree requires that Grade A "Walk-alones" must be afforded as much of the program available to Grade A inmates as possible. Therefore, except where a distinction is indicated by the record, regular "Grade A" condemned inmates and Grade A "Walk-alones" are hereafter referred to collectively as "Grade A" inmates. All references in this Report to "Grade A" inmates should be understood to include by that term all Grade A "Walk-alones", unless otherwise expressly stated.

Quentin's condemned population.[5/]

The law governing the due process entitlement of plaintiffs has not changed materially since entry of the Decree. In *Hewitt v. Helms,* 459 U.S. 460, 66-67 (1983), the Supreme Court held that the due process clause, in and of itself, does not provide any prisoner with a liberty interest in freedom from segregated confinement. However, this point was already foreshadowed at the time of the Decree by the Supreme Court's prior decisions in *Montanye v. Haymes,* 427 U.S. 236 (1976), and *Meachum v. Fano,* 427 U.S. 215 (1976). *Hewitt* did resolve, in favor of plaintiffs, a contention more central to the Compaint: That state administrative regulations can give rise to a liberty interest protected by the Fourteenth Amendment. *Hewitt,* 459 U.S. at 459-61.

Title 15 of the California Code of Regulations,

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5. Part V establishes a minimum weekly outdoor exercise period for all condemned inmates, in response to a probable Eighth Amendment requirement. *See Toussaint v. McCarthy,* 597 F.Supp. 1388, 1412 (N.D. Cal. 1984) (denial of ten hours per week of outdoor exercise violates Eighth Amendment), *reversed in part on other grounds,* 801 F.2d 1080 (9th Cir. 1986). It then guarantees Grade A inmates daily out-of-cell "tier time" in addition to the Eighth Amendment minimum. Part VI of the Decree defines minimum Eighth Amendment requirements such as periodic showers for all condemned inmates. *See id.* at 1411 (denial of some regular access to showers or other personal cleaning facility violates Eighth Amendment). Next it establishes a detailed set of additional privileges to be afforded to Grade A condemned inmates, which exceed the minimum standards of decency required by the Eighth Amendment. These privileges, such as Part VII, regarding visiting, also have no basis in the Eighth Amendment. *See id.* at 1412-13 (visiting restrictions do not infringe Eighth Amendment).

section 3339(a), contains the following provision concerning the segregation of inmates:

> Release from segregation status shall occur at the earliest possible time in keeping with the circumstances and reasons for the inmate's initial placement in administrative segregation.

In combination with sections 3335 and 3336 of the California Code of Regulations, this command accords California inmates a liberty interest in freedom from segregation. *Toussaint v. McCarthy,* 801 F.2d 1080, 1098 (9th Cir. 1986). An inmate can not be retained in segregation at San Quentin, and thereby deprived of this liberty interest, without a finding, made in accordance with due process, that the inmate's presence in the general population would pose a danger to the institution's staff, inmates, or security, or to the integrity of an investigation. *Id.* Nothing in section 3339(a), nor any other California statute or regulation, limits the right to freedom from arbitrary segregation to non-condemned inmates.

Thus, if the Complaint were still at issue today, plaintiffs might well be entitled to secure relief to protect their liberty interest in freedom from "automatic" class-wide segregation. As this legal premise underlying the Consent Decree has not materially changed, it would not be equitable to vacate the entire Consent Decree as defendants request.

The Monitor recommends that defendants' motion

to vacate the Consent Decree should be denied.

Although no issue of contempt is presented, defendants have asked the Court to vacate its order of March 17, 1983 which required that the 68 cells of North Seg be reserved for Grade A condemned inmates. These are now the only facilities at San Quentin in which defendants can house Grade A condemned inmates in full compliance with the existing Decree. The record contains no basis for concluding that it would be equitable to relieve defendants of the duty to comply with the Decree by using North Seg to house Grade A condemned inmates. The Monitor does not recommend that the Court should vacate or otherwise change its order of March 17, 1983.

V.

FINDINGS OF FACT AND CONCLUSIONS OF LAW: SPECIFIC DECREE PROVISIONS

Defendants ask, in the alternative, that the Decree be modified to delete each of the provisions which defendants are not obeying. Consistent with a flexible approach to modification, the Court should evaluate whether defendants have established the equity of modifying each of these specific provisions. If not, defendants should be held in contempt of court, because they have knowingly refused to comply with the Consent Decree.

A. Decree Provision V.B. (Tier Movement).

Part V.B. of the Decree provides that "Grade A inmates shall be allowed access to the tier area between the hours of 9:00 a.m. and 3:00 p.m." It then prescribes specific attributes of the tier time "program" thus guaranteed. As found in the Third Report, defendants do not allow Grade A condemned inmates housed in East Block any tier time.[6/] Defendants do allow Grade A inmates outdoor exercise yard time from roughly 8:30 a.m. to 12:45 p.m., seven days per week.[7/] Grade A Walk-alones are allowed outdoor exercise time for three days per week during the same hours.[8/] The Third Report ordered defendants to show cause why they should not be held in contempt for failing to allow Grade A inmates with daily access to a tier program area.

Defendants ask the Court to modify the Decree to eliminate the requirements of Part V.B., on the ground that it is impracticable to provide indoor "tier time" to condemned inmates housed in East Block. They assert that the physical characteristics of East Block are unsuited for the secure operation of a tier time program without very expensive, wasteful structural changes.[9/] Implicitly,

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6. Third Report, at 18.

7. RT 1/19/89, at 487-88 (testimony of Ms. Hubbard).

8. RT 1/18/89, at 355-56 (testimony of Lt. Hamilton).

9. RT 1/17/89, at 42-55 (testimony of Mr. McMahan).

they take the further position that the Court should not hold defendants in contempt for housing the condemned inmates in East Block solely because "tier time" is impracticable in that unit.

East Block is approximately 55 feet high by 61 feet wide.[10/] Its cells are stacked in five vertical "tiers" that are each approximately 280 feet in length. From a top view, the cells are arranged in two rows parallel to the center line of the building, separated by a five-foot service alley. Outside the front of each tier of cells, except the bottom tier, is a tier walkway that is four feet, six inches in width. On the bottom, "ground" floor of the block, a broadway roughly 15 feet across occupies the area between the cell fronts and the outer wall of the building. The unit is patrolled by armed correctional officers on gunrails mounted on the outer walls of the building at the second tier level and the fourth tier level. These gunrails are three feet, three inches wide.

North Seg, the unit where condemned prisoners were housed at the time of the Decree, houses inmates on a single floor.[11/] Its 68 cells are arranged in two parallel rows on each side of a service alley. Along the outer walls of the unit opposite the cell fronts is a five foot wide corridor patrolled by armed correctional officers. On each longer "side" of North Seg, In between the fronts of

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10. The physical layout of East Block is graphically illustrated in the record by Exhibits 8, 9 and 10.

11. The relevant aspects of the layout of North Seg are graphically illustrated by Exhibits 6-A and 7.

the cells and the officer corridor, is another corridor area that is nine feet, six inches wide. In this nine foot, six inch wide middle corridor, Grade A inmates in North Seg have been permitted a tier time program in accordance with the Consent Decree.

The tier area outside the cells of East Block is not suited for permitting the same type of tier program. In comparison with the North Seg tier exercise corridor, the East Block tier corridors are less than half as wide, front on more cells, and are more difficult to supervise from a secure area accessible to the unit's correctional officers. Although a program of "tier time" involving Grade A condemned inmates was attempted for a brief period in 1983 in Carson Section of South Block, another five-tier cell block at San Quentin, it was ended after prison officials concluded that the project was unsafe. The project did not in any event provide all Grade A condemned inmates housed in Carson with access to the narrow tiers for six hours per day as specified in the Decree.[12/]

Defendants presented evidence that they have, somewhat belatedly, considered modifying the structure of East Block to facilitate a tier time program. The scenario chosen for a "cost/benefit analysis" involved extending East Block's current narrow tier walkways to join with the outer walls of East Block. Under this scenario, "floors" of

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12. Testimony before the Monitor established that the tier access granted during the brief Carson Section project was allocated in blocks of 20 minutes for groups of seven to ten inmates. RT 1/18/89 (testimony of Lt. Hamilton).

cells somewhat comparable to North Seg would be created. However, Robert M. McMahan, an employee of the California Department of Corrections, testified that such a proposal is not considered feasible because, for a variety of reasons, it could not be completed at a cost of less than $50 million.[13/]

Plaintiffs do not argue that that the Court should require a tier time program in the present East Block. Nor do they take issue with the impracticability of the scenario posited in Mr. McMahan's testimony. Instead, plaintiffs contend that defendants have not adequately considered other less costly options for the structural modification of East Block that might enable defendants safely to afford tier time to Grade A inmates. Plaintiffs ask the Court to order defendants to "construct or otherwise provide suitable space to permit out-of-cell time" within six months.[14/]

The Monitor recommends that the Court should avoid unnecessary entanglement in an attempt to specify what structural modifications might, or might not, allow a safe tier time program in East Block. For present purposes, the entire issue can be resolved by modifying the Decree to allow defendants to satisfy the requirements of the Decree with respect to Grade A condemned prisoners housed in East Block by affording such prisoners an opportunity for out-of-cell time that is substantially

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13. RT 1/17/89, at 45-53 (testimony of Mr. McMahan).

14. Plaintiffs' Post-Hearing Brief, Including Proposed Findings of Fact and Conclusions of Law, filed herein May 1, 1989, at 63.

equivalent to North Seg "tier time" in a non-tier location that is already used to provide out-of-cell time -- East Block's exercise yards.

As discussed at length above, the reason for "tier time" and related guarantees in the Decree was to assure Grade A inmates a form of custody that is not segregation. These provisions were intended to relieve the most essential deprivation of segregation: a lack of daily out-of-cell activity. *See Toussaint v. McCarthy,* 597 F.Supp. 1388, 1393 (N.D. Cal. 1984) (segregated status of prisoners is defined "principally by reference to the percentage of each day that they are required to spend in their cells"). As acknowledged by an expert witness called by plaintiffs to testify in the hearing before the Monitor, access to a covered exercise yard is an adequate method of providing out-of-cell time to condemned inmates.[15/]

Currently, Grade A condemned inmates are permitted outdoor exercise time for four hours per day, seven days per week, and Grade A Walk-alones are permitted outdoor exercise for four hours per day, three days per week. Thus, for neither group is the opportunity for out-of-cell time afforded by the outdoor exercise program equivalent to tier time required by the Consent Decree. The record establishes no compelling reason why defendants could not expand the outdoor exercise periods available to these inmates to equal, or at least

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15. RT 1/25/89, at 1195 (testimony of Mr. Martin).

approximate, the tier time required by the Decree.[16/]

The Monitor recommends that defendants should be afforded a reasonable period of time in which to formulate a set of proposed modifications to the Decree consistent with the concept that as to condemned prisoners housed in East Block, outdoor exercise yard time could be substituted for the tier time promised in the Consent Decree. As to condemned prisoners housed in North Seg, no modification is necessary. As to condemned prisoners who might hypothetically, in the future, be housed in units other than East Block and North Seg, no need for modification is currently presented.

Accordingly, the Monitor recommends that defendants be afforded until October 1, 1989 to file with the Court and submit to the Monitor a proposed modification to Part V.B. of the Decree that is consistent with this section of the Report. Should defendants fail to submit a satisfactory proposed modification, the Monitor will recommend a modification suitable for entry by the Court.

B. Decree Provision VI.A.1. (Yard Exercise).

As found in the Third Report, defendants are not complying with Part VI.A.1. of the Decree, which provides

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16. *See* RT 1/24/89 at 1075-78 (testimony of Mr. Martin); RT 1/30/89 at 1418 (testimony of Mr. McMahan); RT 1/19/89 at 492 (testimony of Ms. Hubbard).

that "a portion of the yard will be provided with a covering for protection from inclement weather." Defendants were ordered to show cause why they should not be held in contempt for this violation. Defendants ask the Court to modify the Decree by deleting Part VI.A.1.

Defendants have made no showing that installing a roof over the existing exercise yards of East Block presents an unreasonable threat to institutional security. They ask to be relieved of the obligation to provide a roofed outdoor exercise area for Grade A inmates solely because of the cost of installing such a roof.

Absent persuasive evidence of costs out of all proportion to benefits, the Court should not modify any provision which serves an important goal of the Decree due to cost alone. *See Toussaint v. McCarthy,* 801 F.2d 1080, 1110 (9th Cir. 1986); *see also, McGoff v. Rapone,* 78 F.R.D. 8, 28 (E.D. Pa. 1978). Mr. McMahan testified that the California Department of Corrections has submitted a budget proposal for installing a roof over a portion of East Block's exercise yards in order to comply with the Consent Decree. The estimated cost of this project was stated to be $180,000.[17] By way of comparison, the projected cost of either building a new facility, or altering East Block, to allow tier time as required by the Decree was estimated by defendants' witnesses to be in the range

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17. RT 1/17/89 at 68.

of $50 million to $100 million.[18] Thus, even if the actual cost of constructing an East Block roof should prove to be as much as 50 percent more than the estimate referred to by Mr. McMahan, the construction of such a roof is a far more economical solution to the need to afford acceptable out-of-cell activity to Grade A condemned inmates than is the renovation of East Block to accommodate "tier exercise".

As discussed above, the guarantee of out-of-cell time to Grade A condemned inmates under conditions similar to those available to the general population inmates of San Quentin is a central goal of the Decree. General population inmates, during out-of-cell time, have access to areas that are roofed or otherwise protected from exposure to adverse weather conditions. It would be inconsistent with the goals of the Decree, and inequitable, to deny Grade A condemned prisoners similar access to a sheltered area while they are out of their cells.[19]

Because defendants are not complying with Part VI.A.1. of the Decree, they are in contempt of court. The Monitor recommends that the Court should not at

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18. *Id.* at 53 (testimony of Mr. McMahan); *id.* at 130 (testimony of Ms. Yamamoto as to cost of recent renovations to East Block that would be rendered inoperable); *id.* at 188 (testimony of Mr. Schultz).

19. As discussed above, defendants are also asking the Court to relieve them of the obligation to provide East Block condemned inmates with "tier time", which is one form of sheltered out-of-cell activity guaranteed in the Decree. The granting of this request could be deemed equitable only if the existing Decree requirement of access to a covered outdoor area is preserved.

this time impose any sanction for this contempt, provided that defendants submit to the Monitor, and file with the Court, on or before October 1, 1989, a satisfactory plan for installing a roof over a portion of all exercise yards used by Grade A condemned inmates, and further provided, that defendants act with all possible diligence to provide roofed yards as required by Part VI.A.1. at the earliest possible time.

C. Decree Provision VI.A. (Yard Equipment).

In the Third Report, defendants were ordered to show cause why they should not be held in contempt for denying Grade B condemned inmates access to any of the yard equipment specified in the Decree, with the exception of a basketball, hoop and net and a chinning bar. The remaining yard equipment promised in Part IV.A. of the Decree, to which the Grade B prisoners are not permitted access, consists of: (1) a weight machine; (2) one heavy punching bag; (3) one speed bag; (4) gloves for use with the punching bag and speed bag; (5) one medicine ball; (6) jump ropes; and (7) free weights. Defendants now ask the Court to modify the Decree to relieve them of the obligation to provide Grade B condemned inmates with these items.

As evidence of the dangers presented by yard exercise equipment, defendants adduced testimony concerning a single incident in which a Grade B condemned inmate took advantage of a moment when his victim was bench pressing free weights to make a fatal

assault.[20] Defendants provided no specific evidence of any instance in which access to a weight machine, heavy punching bag, speed bag, gloves for use with the punching bag and speed bag, medicine ball or jump ropes has ever been a factor in any misconduct or violence by a Grade B condemned inmate. Rather, the evidence showed that each of the above items has the potential to cause some form of security problem if misused.[21]

The Court should be reluctant to rely on the generalized "potential" for misconduct as a ground for modifying the Decree. *See generally, Kozlowski v. Coughlin,* 871 F.2d at 248-49. Virtually any item can be used by a prison inmate in a manner inconsistent with prison security if the inmate is so inclined.[22] However, in this particular instance, the circumstances do warrant relieving defendants of the yard equipment obligations of Part VI.A. of the Decree with respect to Grade B condemned prisoners.

The Decree was drafted to govern a situation in which all condemned inmates used a single exercise yard. At the end of 1980 (the year the Decree was entered), the total number of condemned inmates in the state of

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20. RT 1/19/89, at 544-46; Post-Hearing Brief in Support of Defendants' Motion to Vacate or Modify Consent Decree, filed herein May 1, 1989, at 17 n.3.

21. RT 1/19/89 at 481-82, 548-54 (testimony of Ms. Hubbard); *id.* at 642-45 (testimony of Mr. Crittendon).

22. RT 1/24/89, at 1079 (testimony of Mr. Martin).

California was 44.[23] At the end of 1988, the number was 249.[24] As of January 17, 1989, 26 of these inmates were classified Grade B,[25] and more than 200 more were confined at San Quentin as Grade A and Grade A Walk-alones.[26] All of these inmates cannot be afforded an adequate opportunity for outdoor exercise with the frequency required by the Consent Decree on a single exercise yard. Therefore, the condemned population has been divided into yard "groups". Grade B condemned prisoners are assigned to different yard groups than are Grade A and Grade A Walk-alones. While the Grade A and Grade A Walk-alone yard groups continue to have access to all of the yard equipment specified in the Decree, the yard groups composed of Grade B condemned inmates do not.

Grade B condemned inmates are accorded outdoor exercise privileges substantially similar to those afforded San Quentin's non-condemned segregated inmates. The Eighth Amendment does not require that any particular yard equipment be made available to segregated inmates. *See Toussaint v. McCarthy,* 597 F.Supp. at 1412 (ability to "walk about" could satisfy exercise requirement); *see also, Peterkin v. Jeffes,* 855 F.2d 1021, 1031-32 (3rd Cir. 1988)

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23. Exhibit 20, at 1.

24. *Id.*

25. Exhibits 26 through 52.

26. Exhibit 21, at 2; *see also,* RT 1/17/89 at 221 (testimony of Ms. McGuinn).

(Eighth Amendment not violated even though condemned prisoners allowed to exercise only in "dog runs" in which calisthenics, jogging, and handball were possible). Non-condemned segregated inmates are allowed access to the yard equipment specified in Part VI.A. of the Decree only at the discretion of prison officials.[27/] Preservation of the requirement that Grade B condemned inmates must be afforded access to the specified yard equipment would, in effect, confer upon condemned Grade B inmates a privilege not available to their non-condemned segregated counterparts.

The wording of the Decree does not conclusively establish that its framers contemplated that condemned Grade B inmates would be guaranteed special yard privileges not available to non-condemned segregated inmates. To require such privileges restricts the options available to defendants for permitting exercise to Grade B inmates, because it would require, in effect, that Grade B condemned be isolated from both other condemned and other segregated inmates for purposes of exercise.

As mentioned above, the Court in this case has previously modified the Decree to preclude application of various provisions to Grade B condemned inmates. *See* Order filed herein January 20, 1982, at 2. Because there is no colorable basis in federal law for requiring properly classified Grade B condemned prisoners to receive access

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27. Testimony before the Monitor indicated that defendants have exercised discretion to allow free weights to some non-condemned segregated inmates at San Quentin. RT 1/19/89, at 600-01 (testimony of Ms. Hubbard).

to special yard equipment, it would not be unfair to such prisoners to change the Decree to relieve defendants of the obligation to provide such access. Grade B inmates, at least in theory, have the ability to obtain guaranteed access to the yard equipment listed in the Decree by "working their way" up to Grade A status through good behavior.

The Monitor recommends that the Court should modify the Decree to relieve defendants of the mandatory obligation to provide Grade B condemned prisoners with access to any particular item of yard equipment specified in Part VI.A. of the Decree. The Monitor further recommends that defendants be afforded until October 1, 1989 to file with the Court and submit to the Monitor a proposed modification to Part VI.A. that is consistent with this section of the Report. Should defendants fail to submit a satisfactory proposed modification, the Monitor will recommend a modification suitable for entry by the Court.

D. Decree Provision VI.B. (Tier Equipment).

Defendants have also been ordered to show cause why they should not be held in contempt for failing to provide Grade A inmates with access to the tier equipment specified in Part VI.B. of the Consent Decree. This equipment consists of: (1) two tables with fixed seats; (2) two ping pong tables; (3) a speed bag with appropriate gloves; (4) "miscellaneous" table and board games; and (5) ash trays and trash containers. Lack of

access to all of these items "on the tier" is a consequence of the lack of any tier time program, which has been discussed above.

All of the equipment specified in Part VI.B. of the Decree, except for ping-pong tables, is available to Grade A inmates when they are on East Block's exercise yards.[28/] If, as recommended above, the Court modifies the Decree to relieve defendants of the obligation to provide "tier time" in East Block, and to instead require defendants to afford an amount of time on covered exercise yards equivalent to the "tier time" promised in the Decree, then it would also be equitable to modify the Decree to permit defendants to afford East Block condemned inmates access to the specified "tier equipment" on the exercise yards instead of the tiers. The only remaining issue pertaining to "tier equipment" would then be whether or not defendants should be required to provide access to ping-pong tables, the one item of Part VI.B. "tier equipment" that is not now available to Grade A condemned inmates during exercise periods.

The central purpose of the "tier equipment" provision of the Consent Decree, like the other "Grade A guarantees", is to define a form of custody that is similar to that available to non-segregated inmates at San Quentin. The general population inmates at San Quentin have access to facilities, such as tennis courts and a

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28. Post-Hearing Brief in Support of Defendants' Motion to Vacate or Modify Consent Decree, *supra*, at 12; *see* Plaintiffs' Reply to Post-Hearing Brief, filed May 22, 1989, at 12 (not contesting this assertion of defendants' brief).

football field, that cannot be provided to the condemned Grade A inmates due to space limitations. The Consent Decree provision allowing condemned Grade A prisoners access to ping-pong tables was a reasonable effort to make available sports equipment that could fit in a smaller space.

Defendants presented evidence that standard ping-pong tables are a potential security risk because parts of the tables could be removed and fashioned into weapons, and because the playing surface could be used by inmates as a shield against armed correctional officers.[29/] However, no evidence was presented to show that ping-pong tables allowed to Grade A condemned inmates in North Seg were ever abused in any of these ways. No evidence was presented to show that ping-pong tables could not be constructed in a manner that would reduce these security concerns. No evidence was presented to show why the possibility of reclassification to Grade B status is not sufficient to deter Grade A condemned inmates from abusing ping-pong tables.

As the Second Circuit Court of Appeals held in *Kozlowski v. Coughlin*, 871 F.2d 241, 247 (2d Cir. 1989):

> [W]hile accommodating the maintenance of prison security by flexibly responding to changed conditions, [the Court] must strive to preserve the negotiated goals of a decree. To alter the current equation, [defendants] bear the burden of clearly showing that

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29. RT 1/19/89, at 645-46 (testimony of Mr. Crittendon).

> quantum of necessity needed to convince [the Court] of the need for action.

With respect to all of the Decree's Grade A guarantees which defendants seek to abrogate without any showing of abuse by Grade A condemned prisoners, defendants have not met this burden. *See id.* at 248-49 (district court refusal to modify consent decree affirmed where not a single occurrence, and no credible statistics, were cited to document the alleged security problem addressed by the proposed modification); *see also, Badgley v. Santacroce,* 853 F.2d 50, 54 (2d Cir. 1988) (defendants have burden of proof of reasons why Consent Decree should be modified).

Defendants have not established that modification of Part VI.B.2. of the Consent Decree to relieve defendants of the obligation to provide Grade A condemned inmates with access to ping-pong tables would be equitable. Therefore, any modification to Part VI.B.2. should continue defendants' present obligation to provide such access.

The Monitor recommends that defendants should be afforded until October 1, 1989 to file with the Court, and submit to the Monitor, a proposed modification to Part VI.B. of the Decree that is consistent with this section of the Report. Should defendants fail to submit a satisfactory proposed modification, the Monitor will recommend a modification suitable for entry by the Court.

E. Decree Provision VI.C.3. (Tier Shower Access).

In the Third Report, defendants were ordered to show cause why they should not be held in contempt for failing to allow Grade A inmates with showers during periods when they are afforded access to the tier. The Third Report found that, because defendants did not afford Grade A inmates any access to the tiers, defendants were violating Part VI.C.3. of the Decree.[30/]

If the Court adopts the recommendation stated herein that defendants should be relieved of the obligation to provide a "tier time" program, then defendants should also be relieved of the obligation to provide access to showers during tier time. Grade A condemned inmates have access to yard showers during their exercise periods. If the exercise periods are expanded, and the exercise yards roofed, all as recommended above, then the purposes of the Decree could be served by the availability of adequate yard showers.

The only substantial issue with respect to the adequacy of yard showers arises from the fact that East Block's exercise yard showers are plumbed with only cold water. Plaintiffs maintain that in the absence of hot water, yard showers do not present an adequate opportunity for showering.

The Monitor takes judicial notice that the Court has previously found, in the case of *Toussaint v. Rowland,*

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30. Third Report, at 27.

No. C 73-1422 SAW (N. D. Cal.), that at San Quentin, a yard shower opportunity is not adequate without hot running water if the outside air temperature is less than 60 degrees Fahrenheit, or if it is raining.[31] No evidence has been introduced to warrant a different finding in this case. Therefore, the Monitor recommends that if the Consent Decree is modified to permit defendants to satisfy Part VI.C.3. of the Consent Decree as to Grade A condemned inmates housed in East Block by affording them access to yard showers during exercise periods, the modification should require to defendants to furnish hot water to the yard showers at any time when the outside air temperature is less than 60 degrees Fahrenheit, or when it is raining.

The Monitor recommends that defendants should be afforded until October 1, 1989 to file with the Court, and submit to the Monitor, a proposed modification to Part VI.C.3. of the Decree that is consistent with this section of the Report. Should defendants fail to submit a satisfactory proposed modification, the Monitor will recommend a modification suitable for entry by the Court.

F. Decree Provision VI.D.4. (Tier Lunches).

Defendants have been ordered to show cause why they should not be held in contempt for failing to allow

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31. *Toussaint v. McCarthy*, First Report of the Monitor, as amended by Supplement, filed June 8, 1985, *adopted in pertinent part by Court, id.*, Docket No. 1938 A, June 13, 1985.

Grade A inmates to consume their noon meal, a bag lunch, on the tier as required by Part VI.D.4. of the Consent Decree. Again, the lack of compliance with this requirement derives from the absence of any "tier time" program for Grade A condemned inmates.

Condemned inmates are not permitted to eat bag lunches on the exercise yards which they occupy at the noon hour. Rather, the bag lunches are deposited in the cells of the inmates, to be consumed by them upon their return from the yard. The prison official in charge of daily operations in East Block testified that this system aids in maintaining accountability for lunches distributed.[32/] After experience in segregation units both serving lunches on the yard, and serving lunches in cells, she and other prison officials have concluded that serving lunches in cells causes fewer problems and allows more assurance that all inmates will receive their lunches.[33/]

Group dining is a daily activity of a general population inmate that is conspicuously absent from the routine of a segregated inmate at San Quentin. *See Toussaint v. McCarthy*, 597 F.Supp. at 1395. Part VI.D.4. was a reasonable method of assuring a form of group dining opportunity for Grade A condemned inmates. It therefore relates to an integral purpose of the Decree.

Though the Monitor credits the testimony by East Block's head administrator that providing bag lunches to

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32. RT 1/19/89, at 493 (testimony of Ms. Hubbard).

33. *Id.* at 493-94.

condemned inmates on their exercise yard is somewhat more difficult than providing the lunches in their cells, the testimony does not establish a compelling reason for denying these inmates their only feasible opportunity for any form of group dining. On the other hand, it would not be equitable to require defendants to serve any Grade A condemned inmate on an exercise yard if both prison officials and the inmate are in agreement that the inmate would prefer to receive his lunch in the cell. Therefore, the Monitor recommends that Part VI.D.4. of the Decree should be modified to require defendants to offer Grade A condemned inmates some form of option to eat their bag lunches on the exercise yards.

The Monitor recommends that defendants should be afforded until October 1, 1989 to file with the Court, and submit to the Monitor, a proposed modification to Part VI.D.4. of the Decree that is consistent with this section of the Report. Should defendants fail to submit a satisfactory proposed modification, the Monitor will recommend a modification suitable for entry by the Court.

G. Decree Provision VI.E.1. (Cell Furnishings).

The Third Report required defendants to show cause why they should not be held in contempt for failing to equip cells occupied by Grade A condemned inmates with either a shelf or, in the alternative, a cabinet as required by the Decree. In response to this order, defendants ask the Court to modify the Decree to relieve them of this obligation.

In support of their request, defendants presented evidence that, at a time before the East Block housed condemned inmates, some cell shelves in the unit were disassembled and made into weapons.[34/] They presented no evidence that any such activity was performed by Grade A or Grade A inmates, or that such inmates, as a class, abused the cell shelving that was formerly available to them in North Seg. Cell shelving is present in the cells of general population inmates at San Quentin. Defendants did not establish that cell shelving is a more serious threat to security in the cells of Grade A condemned inmates than it is in the cells of general population inmates. Thus, defendants have failed to show any sufficient reason why it would be equitable to modify the Consent Decree to relieve defendants of the obligations of Part VI.E.1.

Because defendants are not complying with Part VI.E.1. of the Decree, they are in contempt of court. The Monitor recommends that the Court should not at this time impose any sanction for this contempt, provided that defendants submit to the Monitor, and file with the Court, on or before October 1, 1989, a satisfactory plan for providing either a cell shelf or some reasonably equivalent alternative to all Grade A condemned inmates, and further provided, that defendants act with all possible diligence to provide cabinets or shelves as required by Part VI.E.1., or a reasonable alternative, at the earliest possible time.

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34. RT 1/19/89, at 517 (testimony of Ms. Hubbard).

H. Decree Provision VI.E. (Personal Property).

In the Third Report, defendants were ordered to show cause why they should not be held in contempt for refusing to permit Grade B condemned prisoners to purchase or possess typewriters, writing boards, reading lamps or electric razors, as required by Part VI.E. of the Decree. Defendants maintain that any of these items in the hands of a Grade B inmate constitute a security hazard.[35/]

Non-condemned segregated inmates at San Quentin are not permitted to purchase or possess any of the items listed above. The Eighth Amendment is not violated by this deprivation. Apart from the fact that defendants so agreed when entering into the Consent Decree, the Monitor has not discerned any reason why Grade B condemned inmates should be guaranteed access to writing boards, reading lamps or electric razors. It would be equitable to modify the Decree to delete these requirements.

With respect to typewriters, it might be argued (although no authority to this effect has been presented) that Grade B condemned inmates have needs for legal self-help that are sufficiently more acute than the needs of non-condemned segregated prisoners to warrant distinct treatment under the Decree. However, as recently as May 27, 1988, plaintiffs entered into, and requested a

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35. RT 1/19/89, at 648-49 (testimony of Mr. Crittendon).

state court's approval of, a stipulation concerning typewriters, which is attached as Exhibit A to this Report. Under the stipulation, defendants modified San Quentin Institutional Procedure (IP) 215, which expressly denied Grade B condemned inmates permission to possess typewriters. The pertinent part of IP 215 is attached as Exhibit B to this Report. While plaintiffs asked the Court to approve, indirectly, the stipulation concerning typewriters,[36/] they did not notify the Monitor or the Court of any objection to the provisions of IP 215 forbidding possession of typewriters by Grade B inmates -- provisions that are directly contrary to the Decree. Given plaintiffs' total failure to raise the issue at a time when defendants' rules on typewriters were under review, there is no compelling reason to preserve the Decree provision requiring defendants to allow Grade B condemned inmates to possess typewriters.

The Monitor recommends that Parts VI.E.5., VI.E.9., VI.E.10., and VI.E.11. should be modified so as to relieve defendants of the obligation to provide writing boards, reading lamps, typewriters, and electric razors to Grade B condemned inmates. The Monitor recommends that defendants should be afforded until October 1, 1989 to file with the Court, and submit to the Monitor, a proposed modification to these Parts of the Decree that is consistent with this recommendation. Should defendants fail to submit a satisfactory proposed

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36. Stipulation to Modify Consent Decree and Order, filed herein March 17, 1988.

modification, the Monitor will recommend a modification suitable for entry by the Court.

I. Decree Provision VI.E (Belts and Mirrors).

The Third Report ordered defendants to show cause why they should not be held in contempt for failing to issue mirrors and belts to incoming Grade B condemned inmates. Defendants ask the Court to modify the Decree to relieve them of the obligation to issue these items to Grade B condemned inmates.

Non-condemned segregated inmates at San Quentin are not permitted to possess mirrors or belts in their cells, as both types of items are considered to present undue security risks in the hands of segregated prisoners.[37] In accord with the above discussion of yard equipment and personal property, it would be equitable to modify the Consent Decree to relieve defendants of the obligation to provide Grade B condemned inmates with special treatment in this regard. However, any such modification to the Decree should also improve upon the present wording to clarify the requirement that Grade A condemned inmates must be permitted to possess mirrors

37. RT 1/19/89, at 483 (testimony of Ms. Hubbard). As establishing the unavailability of mirrors and belts to segregated non-condemned inmates, the Court may take judicial notice of the Fifth Report of the Monitor in the case of *Toussaint v. Rowland*, No. C 73-1422 SAW, filed June 27, 1989, at p. 6.

and belts.[38/]

The Monitor recommends that defendants should be afforded until October 1, 1989 to file with the Court, and submit to the Monitor, a proposed modification to Part VI.E.15. of the Decree that is consistent with this recommendation. Should defendants fail to submit a satisfactory proposed modification, the Monitor will recommend a modification suitable for entry by the Court.

J. Decree Provision VI.F.1. (Grade A Canteen):

The Third Report ordered defendants to show cause why they should not be held in contempt for failing to provide Grade A condemned inmates to purchase the following canteen items which are available to San Quentin's general population inmates: baby oil, shoe polish, plastic spoons, dental floss, toothpicks, and creamer. Defendants ask the Court to modify Part VI.F.1. of the Decree to relieve them of the obligation to allow these canteen items.

Defendants' proffered basis for modifying the Decree with respect to these items is that each of the items could potentially be misused in some way that is

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38. The present wording of Part VI.E.15. of the Decree speaks only of the obligation to "issue" the specified items to "incoming inmates". Because all "incoming" condemned inmates are initially classified as Grade B, a literal reading of the provision might imply that it does not impose an obligation on defendants to provide inmates with these items, or to allow them to possess the items, after they are reclassified to Grade A or Grade A Walk-alone status. This implication would be inconsistent with the clear intent of the Decree.

hazardous to other inmates, staff, or institutional security. Defendants produced no evidence that any of these items has ever been misused in such a way by a condemned Grade A inmate. Also, defendants have not shown why the prospect of reclassification to Grade B status cannot deter such misuse. Access to these canteen items is another aspect of "general population equivalency" that the Consent Decree guaranteed to Grade A condemned inmates. It would not be equitable to abrogate this guarantee. *See, e.g., Kozlowski v. Coughlin,* 871 F.2d at 248-49.

Because defendants are not complying with Part VI.F.1. of the Decree, they are in contempt of court. The Monitor recommends that the Court should not at this time impose any sanction for this contempt, provided that defendants submit to the Monitor, on or before October 1, 1989, proof that defendants are affording Grade A condemned inmates access to all of the canteen items specified in the Third Report.

K. Decree Provision VI.F.2. (Grade B Canteen).

The Third Report ordered defendants to show cause why they should not be held in contempt for failing to allow Grade B condemned inmates to purchase lighters and plastic deodorant, which are canteen items available to Max B -- but not "Max A"
-- segregated inmates. Defendants ask the Court to modify the Decree to relieve them of the obligation to permit Grade B inmates to purchase these items.

In support of this request, defendants presented evidence that plastic items have been increasingly used by segregated inmates to fabricate weapons since these inmates were deprived of metal cell shelving.[39/] Cigarette lighters can, of course, be used to start fires and, according to prison officials, the metal parts of such lighters can be used to cut cell bars or other metal items.[40/] This testimony established only "generalized" security concerns, which are not founded on the specific misconduct of any Grade B condemned inmate. The Monitor nevertheless concludes, for the same reasons expressed above in connection with yard equipment and personal property items, that it would be inequitable to continue the Consent Decree in a form that denies prison officials discretion to deny plastic deodorant and lighters to prisoners who have a high escape or violence potential or are serious disciplinary or management cases.

The Monitor recommends that defendants should be afforded until October 1, 1989 to file with the Court, and submit to the Monitor, a proposed modification to Part VI.F.2. of the Decree that is consistent with this recommendation. Should defendants fail to submit a satisfactory proposed modification, the Monitor will recommend a modification suitable for entry by the Court.

L. Decree Provision VI.G.1. (Oil Paints).

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39. RT 1/19/89, at 655 (testimony of Mr. Crittendon).

40. RT 1/19/89, at 650-51 (testimony of Mr. Crittendon).

Defendants have been ordered to show cause why they should not be held in contempt for failing to provide Grade A condemned inmates with oil paints for use in art hobbycraft. Defendants ask the Court to modify the Decree to eliminate this obligation.

In support of their request, defendants presented testimony that oil paints are toxic and flammable, and that the thinners used in conjunction with such paints are also toxic and flammable.[41] To eliminate the health and fire hazards associated with oil paints, defendants no longer allow any inmates at San Quentin to use oil paints in their cells.[42] Plaintiffs do not contend that oil paints serve any important purpose that cannot be served just as well by other art hobbycraft materials that are still available to the Grade A condemned inmates. For these reasons, the Monitor concludes that it would be equitable to modify the Decree to relieve defendants of the obligation to allow any condemned inmate to possess oil paints in his cell while continuing to assure Grade A condemned inmates of access to adequate art supplies.

The Monitor recommends that defendants should be afforded until October 1, 1989 to file with the Court, and submit to the Monitor, a proposed modification to Part VI.G.1. of the Decree that is consistent with this recommendation. Should defendants fail to submit a

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41. RT 1/20/89, at 796 (testimony of Mr. Fries).

42. *Id.* at 800.

satisfactory proposed modification, the Monitor will recommend a modification suitable for entry by the Court.

M. Decree Provision VI.G.2 (Grade B Art Hobbycraft).

The Third Report ordered defendants to show cause why they should not be held in contempt for failing to provide Grade B inmates with access to art hobbycraft. In response, defendants presented evidence that certain items of hobbycraft, namely, exacto knives, markers, and felt-tip pens, could potentially be used in ways that would constitute a security hazard.[43] Plaintiffs dispute that exacto knives, markers, and felt-tip pens constitute the types of art hobbycraft that Grade B inmates were promised in the Decree.[44] Plaintiffs do not identify what other items of prohibited hobbycraft they believe to be required by the Decree.

The present record does not permit adequate analysis of the Grade B hobbycraft issue. Accordingly, the Monitor recommends that plaintiffs should be afforded until October 1, 1989 to submit to the Monitor a concise statement of the art hobbycraft materials for Grade B inmates that they believe to be required by the Decree, together with an explanation of the reasons why a

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43. RT 1/19/89, at 631 (testimony of Mr. Crittendon) (exacto blade); *id.* at 646-47 (sewing needles); *id.* at 634 (marker pen).

44. Plaintiffs' Reply to Defendants' Post-Hearing Brief, *supra*, at 19-20.

requirement of access by Grade B inmates to these materials should continue to be required by the Decree. After receiving such a submission, the Monitor will make a recommendation as to whether defendants should be found in contempt for failing to comply with Part VI.G.2. of the Decree.

N. Decree Provision VI.N. (Group Religious Services):

The Third Report found that "no group religious services currently are provided for Grade A inmates."[45] On the basis of this finding, which was not appealed, defendants were ordered to show cause why they should not be held in contempt of court for failing to comply with Part VI.N. of the Consent Decree, which requires group religious services to be permitted "on the tier during the house 9:00 a.m. to 3:00 p.m."

In the hearing before the Monitor, defendants presented the testimony of East Block's chief administrator that group religious services are, in fact, permitted on the exercise yards of the Grade A condemned inmates.[46] She estimated that a minister visits the exercise yards for the purpose of conducting such services, in good weather, an average of two to three times per week.[47] Plaintiffs presented the testimony of a

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45. Third Report, at 30.

46. RT 1/19/89, at 565 (testimony of Ms. Hubbard).

47. *Id.* at 566.

Grade A condemned prisoner that he has never seen a group religious service on the yard in East Block.[48/] However, plaintiffs did not present testimony from any prisoner or other person that he had been denied permission to participate in a group religious service. No evidence was presented to show that the exercise yard is a significantly worse forum for such religious activity than is the tier area in North Seg.

The Monitor recommends that, consistent with other Decree provisions that presuppose "tier time" for Grade A condemned inmates, Part VI.H. of the Consent Decree should be modified to permit defendants to afford Grade A condemned inmates housed in East Block the opportunity for group religious services on the exercise yards of that unit. Defendants should be afforded until October 1, 1989 to file with the Court, and submit to the Monitor, a proposed modification to Part VI.H. that is consistent with this recommendation. Should defendants fail to submit a satisfactory proposed modification, the Monitor will recommend a modification suitable for entry by the Court.

O. Decree Provision VI.J.3. (Tier Cleaning Jobs):

The Third Report found defendants to be failing to comply with Part VI.J. of the Consent Decree, which is entitled "maintenance of tier and cell areas", by failing to employ any Grade A inmates as tier tenders in East

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48. RT 1/25/89, at 1209 (testimony of Mr. Alcala).

Block. However, the Report did not find that sanitation within East Block was inadequate. Also, the Third Report noted that, on June 29, 1988, defendants began employing two Grade A condemned inmates to serve as "yard tenders". Defendants were ordered to show cause why they should not be held in contempt for failing to employ condemned Grade A inmates as, specifically, "tier tenders".

Part VI.J. of the Decree was evidently intended to serve a dual purpose. First, it was intended to assure that adequate sanitation -- an Eighth Amendment requirement -- will be maintained in the condemned unit. The Third Report did not find, nor was it shown in the contempt hearing, that sanitation in East Block has been less than adequate since condemned prisoners were moved into the unit.[49] Second, as a gesture to plaintiffs' liberty interest, Part VI.J. provided a means for a small number of Grade A condemned inmates to perform paid work outside their cells. Currently, the assignment of Grade A condemned inmates as "yard tenders" fulfills this secondary purpose of Parts VI.H.3. and VI.H.4. just as well as if the inmates were "tier tenders".

Though further modification might be warranted if adequate sanitation in East Block is not maintained, it is equitable now to modify the Decree to permit defendants to satisfy the obligations of Part VI.J.3. and VI.J.4. as to

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49. One inmate witness testified that his tier in East Block was mopped by correctional officers four times in the month of December. However, he did not describe the sanitation achieved by these efforts as inadequate. RT 1/25/89, at 1237-38 (testimony of Mr. Alcala).

Grade A condemned prisoners housed in East Block by assigning "yard tender" jobs to Grade A condemned inmates.

The Monitor recommends that defendants should be afforded until October 1, 1989 to file with the Court, and submit to the Monitor, a proposed modification to Part VI.H. that is consistent with this recommendation. Should defendants fail to submit a satisfactory proposed modification, the Monitor will recommend a modification suitable for entry by the Court.

P. Decree Provision VI.L.2. (Blues Exchange):

The Third Report ordered defendants to show cause why they should not be held in contempt for failing to provide condemned inmates with exchange of "blues" once every week, as required by Part VI.L.2 of the Decree. The Third Report found that defendants offer an exchange of blues once every two weeks.[50] Defendants now claim that they do, in fact, offer exchange of blues once per week.[51] However, they offered no evidence in support of this assertion.

As stated in the Third Report, blues exchange is not a major area of concern among condemned

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50. Third Report, at 32.

51. Post-Hearing Brief in Support of Defendants' Motion to Vacate or Modify Consent Decree, *supra*, at 15.

prisoners.[52] Moreover, since the time of the Decree it has been established that the Eighth Amendment -- the apparent basis for Part VI.L.2. -- would allow blues exchange once every two weeks under the conditions prevailing in East Block. *Toussaint v. McCarthy,* 597 F.Supp. at 1423 (injunction requirement of laundry exchange on "regular, not less than bi-weekly, basis"). The Monitor concludes that it would be equitable to modify Part VI.L.2. of the Decree to require exchange of blues not less than once every two weeks.

The Monitor recommends that defendants should be afforded until October 1, 1989 to file with the Court, and submit to the Monitor, a proposed modification to Part VI.L.2. that is consistent with this recommendation. Should defendants fail to submit a satisfactory proposed modification, the Monitor will recommend a modification suitable for entry by the Court.

Q. Decree Provision VII.1. (Wednesday Visiting):

The Third Report ordered defendants to show cause why they should not be held in contempt for failing to comply with Part VII.1. of the Consent Decree, which states that Grade A condemned inmates are to be "eligible for contact visits Wednesday through Monday." Defendants do not now allow any visits by Grade A condemned inmates, except for attorney visits, on Wednesdays. The sole reason cited by defendants for

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52. Third Report, at 32.

discontinuing visits on Wednesdays is a lack of sufficient funds to pay for staff for the East Block visiting room.[53] Defendants apparently would like the Court to modify the Decree to relieve them of the obligation to permit Wednesday visits for Grade A condemned inmates.

Opportunities for visiting by condemned prisoners have improved in some ways since the time of the Decree. Defendants constructed a new visiting facility in East Block, which permits greater comfort and convenience for both inmates and their visitors during personal visits. *See generally,* First Report of the Monitor, filed herein Oct. 31, 1986, at 37-39. These improvements were not required by the Decree.

As stated above in connection with exercise yard roofs, the Court should be loath to accept purported cost considerations as the sole ground for modifying an otherwise effective provision of the Decree. However, the Decree was not intended to assure Grade A condemned inmates better treatment than the general population of inmates at San Quentin. It is undisputed that San Quentin's general population of inmates have also had their weekly visiting days reduced from six to five. On this record, the Monitor concludes that it would be equitable to modify the Decree to permit defendants to afford Grade A condemned inmates the same frequency of visiting that is afforded to San Quentin general population inmates.

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53. *See* Post-Hearing Brief in Support of Defendants' Motion to Vacate or Modify Consent Decree, *supra,* at 5-6.

The Monitor recommends that defendants should be afforded until October 1, 1989 to file with the Court, and submit to the Monitor, a proposed modification to Part VII.1. that is consistent with this recommendation. Should defendants fail to submit a satisfactory proposed modification, the Monitor will recommend a modification suitable for entry by the Court.

R. Decree Provision VIII.3. (Legal Materials):

In the Third Report, both plaintiffs and defendants were ordered to show cause why the Consent Decree should not be amended to state, as Part VIII.3.:[54/]

> 3. Defendants shall, upon the written request of any condemned inmate, provide that inmate with reasonable physical access to an adequate law library.

Defendants oppose the modification. Plaintiffs argue that it is appropriate.

Under the Constitution, the state of California has an affirmative obligation to assure that its prisoners, including condemned prisoners, have meaningful access to the courts. *Bounds v. Smith,* 430 U.S. 817, 824 (1977); *Peterkin v. Jeffes,* 855 F.2d 1021, 1038 (3rd Cir. 1988).

Undisputed testimony introduced in the hearing before the Monitor established that condemned inmates

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54. Third Report, at 43.

have, and will likely continue to have, significant needs for access to courts. Although these inmates have attorneys appointed to represent them in their appeals from, and some collateral attacks on, their death judgments, these attorneys are not authorized to represent the inmates with respect to other types of legal problems that these inmates encounter. These legal problems relate to matters such as child custody, divorce, paternity, veteran's rights, property, and conditions of confinement.[55] Also, at the time of the hearing before the Monitor some 25 inmates with death judgments had not yet been provided with state appointed appellate counsel.[56] Based on the evidence presented, the Monitor finds that the state of California has not discharged its entire obligation to provide condemned inmates with access to courts by providing appellate counsel to represent these inmates.[57]

Defendants maintain that, when combined with condemned inmates' access to other law libraries via a "paging" system, and with the provision of appellate counsel, the East Block pocket library guaranteed by the current Consent Decree is sufficient to ensure

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55. RT 1/24/89, at 880 (testimony of Ms. Sternberg).

56. *Id.* at 874.

57. Defendants argue that modification to the Decree is not warranted because plaintiffs have not demonstrated any specific instance in which a condemned inmate was denied adequate access to courts under the present system. However, such a showing of actual injury is not required for a finding of constitutional violation. *Peterkin v. Jeffes*, 855 F.2d 1021, 1041-42 (3d Cir. 1988).

constitutionally acceptable access to courts. However, as found above, the appointment of appellate counsel does not satisfy all needs of such inmates for access to courts. With respect to these additional needs, defendants are obligated to provide condemned inmates with either adequate assistance for persons trained in the law, or with access to an adequate law library. *Bounds,* 430 U.S. at 828.

After entry of the Consent Decree, *Toussaint v. McCarthy,* 801 F.2d 1080, 1109-10 (9th Cir. 1986), held that the paging system operated by defendants for condemned prisoners at San Quentin does not satisfy the obligation to provide access to courts by means of access to an adequate law library. Uncontradicted evidence before the Monitor establishes that the East Block pocket library does not "improve" the paging system to the point of constitutional adequacy.[58/] Thus, condemned inmates at San Quentin are not afforded access to an adequate law library as required under *Bounds.*

The Court should take judicial notice of the Second Special Report of the Monitor in the case of *Toussaint v. Rowland,* No. C 73-1422 SAW (N.D. Cal.), filed June 30, 1988, and *adopted by Court,* Docket No. 2915, Nov. 10, 1988. That Report detailed the "SHU Law Library" system which the defendants have established to satisfy their obligation to provided adequate access to courts to non-condemned segregated inmates at San

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58. RT 1/25/89, at 1210-11 (testimony of Mr. Alcala); *id.*, at 1250-52 (testimony of Mr. Phillips).

Quentin. In view of the fact that defendants are already operating such a system of access to an adequate law library at San Quentin, it would be equitable to modify the Decree to require defendants to make this system available to the condemned inmates.

The Monitor recommends that the Consent Decree should be amended to state, as new Part VIII.3.:[59]

> 3. Defendants shall, upon the written request of any condemned inmate, provide that inmate with reasonable physical access to an adequate law library.

S. Decree Provision X (Grade B Access to Telephone).

The Third Report ordered defendants to show cause why they should not be held in contempt for refusing to allow Grade B condemned inmates access to tier telephones. Evidence before the Monitor established that Grade B inmates are permitted access to telephones for emergency calls. However, the privilege of using the tier telephone on a regular basis for personal telephone calls is reserved to Grade A condemned inmates.[60] Defendants ask the Court to modify the Decree to relieve

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59. No party has expressed any objection to the form of this modification as it was proposed in the Third Report.

60. RT 1/19/89, at 484-85 (testimony of Ms. Hubbard).

them of the obligation to provide similar telephone privileges to Grade B condemned inmates.

Testimony was given in the hearing before the Monitor that the use of a telephone could present a security hazard if available to a particularly sophisticated inmate bent on coordinating witness intimidation or similar misconduct.[61]

Non-condemned segregated inmates at San Quentin do not enjoy access to tier telephones. For the same reasons explained above in connection with yard equipment, personal property, and canteen items, and also because access to tier telephones by Grade B condemned inmates serves no readily apparent purpose of the Decree, it would be equitable to modify the Decree to relieve defendants of the obligation to provide such access.

The Monitor recommends that defendants should be afforded until October 1, 1989 to file with the Court, and submit to the Monitor, a proposed modification to Part X that is consistent with this section of the Report. Should defendants fail to submit a satisfactory proposed modification, the Monitor will recommend a modification suitable for entry by the Court.

T. Decree Provision XIII (Noise):

The transfer of condemned inmates from North

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61. RT 1/19/89, at 485 (testimony of Ms. Hubbard); *see also*, Exhibit 27 (documents recording reports that a Grade B inmate had written letters in code soliciting violent reprisals against trial witnesses).

Seg, where they were housed at the time of the Decree, to five-tier units of San Quentin, including East Block, introduced these inmates to severe conditions of noise that did not exist in North Seg. With respect to these same five-tier facilities, the Court in the case of *Toussaint v. McCarthy,* 597 F.Supp. 1388, 1397-98 (N.D. Cal. 1984), found that the segregated confinement of large numbers of prisoners in the units produces an "unrelenting, nerve-racking din." The Court concluded that this condition violates the Eighth Amendment. *Id.* at 1409-10. Accordingly, the Court framed Part II.6. of its Judgment of Permanent Injunction in the *Toussaint* case to remedy the noise condition. *Id.* at 1423. The Court's remedy was upheld as against the defendants' challenge on appeal. *Toussaint v. McCarthy,* 801 F.2d at 1110.

The Third Report ordered both plaintiffs and defendants to show cause why the Consent Decree should not be amended to include a noise relief provision substantially similar to the one included in the *Toussaint* Judgment of Permanent Injunction. Plaintiffs, in response, urge that this modification should be adopted. Defendants maintain that such a modification is not necessary because, as the result of measures taken in response to the *Toussaint* Judgment of Permanent Injunction, noise levels in East Block have been reduced to constitutionally permissible levels.

The Monitor concludes that condemned inmates housed in five-tier units at San Quentin should be accorded the same protection against indecent noise as non-segregated inmates housed in the same units. The

fact that the anti-noise provisions of the *Toussaint* Judgment of Permanent Injunction have been effective favors the equity of including a similar provision in the Consent Decree herein. Accordingly, the Monitor recommends that the Court should modify the Consent Decree by adding, at the end of the existing amended Decree, the following text:

XIII. Noise

Defendants shall undertake and continue measures to limit the levels of noise prevailing in five-tier cell blocks used to house condemned prisoners at San Quentin. The following specific measures shall be undertaken and continued unless and until defendants reduce the noise to acceptable levels by alternate means: (1) Inmates in such five-tier cell blocks shall not be permitted to employ any loudspeaking device, including, for example, those devices included in televisions, radios, and stereophonic equipment, unless the device is incapable of producing sound noticeably audible to any person outside the cell of the person using the device. (2) Defendants shall install and maintain sound-absorbing wall coverings in all such five-tier cell blocks. (3) Defendants shall provide each condemned inmate housed in a five-tier cell block with a set of medically approved sound exclusion devices such as, for example, earplugs. If earplugs are used, they shall be issued monthly.

VI.

CONCLUSION

The foregoing constitute the findings of fact, conclusions of law, and recommendations of the Monitor, reported and filed in accordance with Federal Rule of Civil Procedure 53(e)(1).

Dated: August 1, 1989.

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Robert R. Riggs
Monitor

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MAURICE S. THOMPSON, et al.,

Plaintiffs,

v.

JIRO J. ENOMOTO, et al.,

Defendants.

No. C-79-1630 SAW

ORDER

Plaintiff's Motion to Reject in Part Monitor's First Report, Adopt Remainder, and Remand Contempt Motion came on for hearing December 18, 1986. Defendants have not filed a response to plaintiffs' motion. Accordingly, and good cause otherwise appearing,

IT IS HEREBY ORDERED as follows:

1. Plaintiffs' motion is granted with respect to that part of the Monitor's First Report, filed October 31, 1986, from line 1 page 8 to line 9 page 14 and all other parts incorporating that part by reference.

2. The Monitor is directed to construe the consent decree entered in this action on October 23, 1980 as applying to all segregated condemned inmates at San

Quentin, wherever housed.

3. The remainder of the report is adopted as the order of the Court.

4. Plaintiffs' motion for contempt, file on March 21, 1986, is remanded to the Monitor for further proceedings consistent with this order.

Dated: December 18, 1986

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Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MAURICE S. THOMPSON, et al.,

Plaintiffs,

v.

JIRO J. ENOMOTO, et al.,

Defendants.

No. C-79-1630 SAW

ORDER DENYING DEFENDANTS' MOTION FOR RECONSIDERATION AND ALTERNATIVE MOTION FOR STAY

Defendants' motion for reconsideration and alternative motion for stay came on for hearing January 29, 1979, alleging that the conditions under which condemned inmates are housed at the California State Prison at San quentin constituted cruel and unusual punishment and a denial of due process under the federal and state constitutions. The parties entered into a Consent Decree ("Decree") on October 23, 1980. The Decree required defendants to take a number of corrective actions, including modifications in housing, treatment, and privileges of condemned inmates. When the Decree was entered, condemned prisoners were

housed in Condemned Row I in the North Block of North Segregation Unit ("North Seg") at San Quentin.

Sometime after the Decree was entered, defendants began to house some condemned prisoners in the Adjustment Center (also known as Condemned Row II) and in Carson Section ("C-Section") at San Quentin because an increase in the number of condemned prisoners made it impossible to house all condemned prisoners in North Seg.

On January 20, 1982, the Court extended its jurisdiction over the Decree because of defendants' noncompliance and modified the Decree to make certain provisions inapplicable to the Adjustment Center.

Since then, plaintiffs have filed several motions to hold defendants in contempt for noncompliance in the Adjustment Center or C-Section.

On June 29, 1982, the Court denied plaintiff's contempt motion with respect to the Adjustment Center, finding that defendants had been diligent in trying to accomplish the ends of the Decree and that physical and security differences between the Adjustment Center and North Seg made compliance impossible with respect to the Adjustment Center. *Thompson v. Enomoto,* 542 F.Supp. 768, 770 (N.D. Cal. 1982).

On March 17, 1983, the Court found defendants in contempt for violating the visiting rights provisions of the Decree with respect to condemned inmates in North Seg and the Adjustment Center.

Two Years later, the Court granted plaintiffs'

motion to appoint a special master because of continuing violations of the Decree. The Court appointed Robert R. Riggs as Monitor in part because of his familiarity with conditions at San Quentin, including C-Section. Order Granting Plaintiffs' Motion for Appointment of Special Master and Order of Reference (March 25, 1985).

Plaintiffs filed another motion to find defendants in contempt on March 21, 1986, alleging noncompliance in North Seg and in C-Section. Pursuant to the Court's Order of Reference, the motion first was heard by the Monitor. The Monitor issued his report on the motion (Monitor's First Report) on October 31, 1986. As to North Seg, the Monitor sustained some of plaintiff's allegations and denied others. The parties have not contested these rulings. The Monitor did not make findings with respect to C-Section because he found that the Decree applies only to North Seg. Monitor's First Report at 8-14.

Plaintiffs then moved the Court to reverse the Monitor's ruling that the Decree applies only to condemned prisoners in North Seg. Defendants did not submit any papers in response to plaintiffs' motion. The motion was heard on December 18, 1986. The Court heard argument from both sides, and granted the motion. (See Order of Dec. 18, 1986.) Defendants now move the Court to reconsider its Order of December 18, 1986 or, in the alternative, to stay the order pending appeal.

Motion for Reconsideration

Defendants base their motion for reconsideration on Rule 60(b)(6) of the Federal Rules of Civil Procedure.

(See Defendants' Reply at 1.) Rule 60(b) provides that "on motion and upon such terms as are just the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons . . . (6) any other reason justifying relief from the operation of the judgment." Defendants' Rule 60(b)(6) motion is improper.

First, the Order from which defendants request relief is not final. *See Waco-Porter Corp. v. Tubular Structures Corp. of America*, 222 F.Supp. 332, 333 (S.D. Cal. 1963). The Monitor's ruling that the Decree applies only to North Seg was made in the process of deciding plaintiffs' contempt motion. The Court reversed this ruling, directed the Monitor to construe the Decree as applying to all condemned inmates in San Quentin, and remanded plaintiffs' contempt motion. Thus, the Court has to finally decided whether defendants are in contempt with respect to prisoners housed in C-Section. Indeed, an order regarding a contempt motion made after the entry of a consent decree is not final until a party is found in contempt and the court imposes sanctions. *Motorola, Inc. v. Computer Displays Int's, Inc.*, 739 F.2d 1149, 1154 (7th Cir. 1984); *see also Shuffler v. Heritage Bank*, 720 F.2d 1141, 1145 (9th Cir. 1983). Moreover, the interpretation of the Decree that the Court made as part of its Order of December 18, 1986 is not a final order. *See Motorola, Inc.*, 739 F.2d at 1155.

Second, defendants have not demonstrated the "extraordinary circumstances" required for reconsideration under Rule 60(b)(6). *See Ashford v. Steuart*, 657 F.2d

1053, 1055 (9th Cir. 1981). The only circumstances that defendants allege are that the Court erred in finding that defendants did not oppose plaintiffs' motion and in finding that the Consent Decree applies to C-Section. These circumstances are not extraordinary. *See Hartman v. Lauchli*, 304 F.2d 431, 432 (8th Cir. 1962) (a Rule 60(b)(6) motion is not a substitute for appeal; an erroneous judgment is not a ground for relief under Rule 60(b)(6)).

Because the Court's Order of December 18, 1986 is interlocutory, the Court has inherent power to reconsider that Order. *See Waco-Porter Corp.*, 222 F.Supp. at 333. Exercising its discretion, the Court will construe defendants' motion for reconsideration as a motion for reconsideration of an interlocutory order and will reconsider its Order of December 18, 1986.

Defendants argue that the Court's Order is misleading because it implies that defendants did not oppose plaintiffs' motion. Defendants argue that the scope of the Decree was raised before the Monitor on March 21, 1986 when plaintiffs alleged that defendants have violated the Decree. Defendants opposed the applicability of the Decree to C-Section in a response to plaintiffs' allegations (filed with the Monitor on April 10, 1986) and in a memorandum of points and authorities (filed with the Monitor on June 20, 1986). However, after plaintiffs filed their motion to review the Monitor's decision, defendants filed neither an opposition nor a statement of no opposition. If defendants wanted to rely on the briefs they submitted to the Monitor, they should

have filed an opposition incorporating those briefs. Defendants' failure to file anything in response to plaintiffs' motion clearly was a violation of Local Rule 220-3 (a party shall serve and file an opposition or statement of no opposition not less than fourteen days preceding the noticed date of hearing). Therefore, the Court did not err in stating that defendants did not file a response to plaintiffs' motion.

Defendants also argue that the Court incorrectly ruled that the Decree applies to all condemned prisoners at San Quentin. Defendants' basis for this argument is the language in the complaint and in the Decree that refers to North Seg.

Although many provisions of the Decree refer to North Seg, other provisions refer to condemned inmates in general. Further, the Decree should be interpreted in light of its basic purpose, which was to provide minimal living conditions for all condemned inmates. *See United States v. Motor Vehicle Mfrs. Ass'n,* 643 F.2d 644, 650 (9th Cir. 1981).

Defendants' behavior since the Decree was entered is additional evidence that the Decree applies to all condemned prisoners. *See* 1 B.E. Witkin, Summary of California Law, *Contracts* §§ 526, 527 (8th ed. 1973) (parties' subsequent conduct is evidence of a contract's meaning). Defendants have applied some of its provisions in the Adjustment Center and C-Section. Moreover, defendants previously have argued that the Decree applies to condemned inmates in C-Section. In proceedings before the Monitor in *Toussaint v. McCarthy,* C-73-1422

SAW, the *Thompson* plaintiffs argued that the *Toussaint* injunction applied to condemned inmates in C-Section. Defendants contended that the rights of condemned inmates in C-Section were governed exclusively by the *Thompson* Decree. The Monitor agreed with defendants, and refused to apply the *Toussaint* injunction to condemned inmates in C-Section. *Toussaint v. McCarthy*, C-73-1422 SAW, Reporter's Transcript of Proceedings before Robert R. Riggs, Monitor, Nov. 29, 1984. Thus, defendants' own statements are evidence that the Decree does apply to C-Section.

The Court's prior orders recognize that the Decree applies to the Adjustment Center and C-Section. The Court would not have modified the Decree because of the impossibility of complete compliance in the Adjustment Center if the Decree did not apply to that unit. Similarly, the Court would not have found that defendants violated provisions of the Decree with respect to the Adjustment Center unless the Decree applied to those units. Likewise, the Court would not have appointed a special master because of violations of the Decree in C-Section if C-Section were not covered by the Decree. These orders are the law of the case and should not be reversed unless new evidence is presented, there is new controlling authority, or the prior decisions were clearly erroneous and would result in injustice. *Handi Investment Co. v. Mobil Oil Corp.*, 653 F.2d 391, 392 (9th Cir. 1981). None of these factors are present.

The Monitor concluded that the Decree applies only to North Seg because "by refusing to hold defendants

in contempt for failing to meet the Decree's requirements in the Adjustment Center absent modification of the Decree, it arrived at the same result." Monitor's First Report at 11:6-9. The Monitor's conclusion is mistaken. First, the result is not the same. For example, in March, 1983 the Court found defendants in contempt for denying prisoners in the Adjustment Center the visiting privileges accorded by the Decree. Although compliance with some provisions of the Decree may be impossible, compliance with other provisions is feasible. Thus, excluding the Adjustment Center and C-Section from the scope of the Decree altogether does not have the same effect as deciding whether compliance with particular provisions is possible. Second, failing that defendants have not complied with the Decree in the Adjustment Center necessarily implies that the Decree covers the unit. Finally, in deciding to appoint a special master, the Court considered whether the Decree applied to C-Section.

Defendants may well be estopped from arguing that the Decree applies only to North Seg. Two kinds of estoppel -- equitable and judicial -- apply here. Under equitable estoppel, a party who successfully asserts a legal position may not later change the position if it will prejudice the opposing party. *Davis v. Wakelee,* 156 U.s. 680, 689 (1895). Under judicial estoppel, a party may not change his position in legal proceedings whenever it suits his self interest; a party may not play "fast and loose" with the court. *Scarano v. Central R. Co. of New Jersey,* 203 F.2d 510, 513, (3d Cir. 1953); 1B J. Moore, Moore's Fed. Practice ¶ 0.405[8]. Prejudice is not required. 1B J.

Moore, Moore's Fed. Practice ¶ 0.405[8].

Here, defendants' position is inconsistent with that successfully taken earlier on the same issue and with the same opposing party. Defendants' prior admissions of noncompliance in units beside North Seg, requests for modification of the Decree with respect to units beside North Seg, and assertions in the *Toussaint* proceedings that the Decree encompasses C-Section are inconsistent with their current position. Thus, defendants are judicially estopped from asserting that the scope of the Decree is limited to North Seg.

Plaintiffs have been prejudiced because defendants' actions induced plaintiffs not to proceed with this litigation as to inmates in the Adjustment Center and C-Section and induced the Monitor not to apply the *Toussaint* injunction to condemned inmates outside North Seg, depriving plaintiffs of the benefits of that decree. Thus, defendants are equitably estopped from asserting that the scope of the Decree is limited to North Seg.

Motion for Stay

In an alternative motion, defendants ask the Court to stay its Order of December 18, 1986 pending appeal. Three considerations are relevant to deciding a motion to stay an order: whether the movants have established a strong likelihood of success on the merits, whether the balance of irreparable harm favors the movants, and whether the public interest is served by the grant of a stay. *Warm Springs Dam Task Force v. Gribble,* 565 F.2d 549, 551 (9th Cir. 1977) (per curiam). Stays rarely are granted because they interrupt the usual appellate process

and deny relief for the prevailing party. *Id.*

Defendants merely argue that plaintiffs would not be prejudiced by a stay because constitutional rights are not implicated by the Court's Order and condemned inmates who are not housed in North Seg can file a separate action. Even if defendants are correct in arguing that plaintiffs would not be prejudiced, defendants have not shown that they would be prejudiced, that they are likely to prevail on the merits, or that the public interest would be served by a stay.

Request for Partial Reconsideration or Stay

In their reply brief, defendants for the first time present another alternative request. If the Court does not rescind or stay the entire order of December 18, 1986, defendants ask the Court to reconsider or stay only that part of the Order that would require application of those provisions of the Decree that are based on the unique physical structure of North Seg to prisoners outside of North Seg. In effect, defendants ask the Court to modify the Decree to make certain provisions inapplicable outside North Seg. (See Defendants' Proposed From of Order, submitted Jan. 22, 1987.) Plaintiffs have not had an opportunity to brief this request, and the record does not clearly demonstrate that modification of the Decree is justified. On remand of plaintiffs' contempt motion, if the Monitor determines that compliance with certain provisions of the Decree is not possible and the Court affirms, defendants will not be held in contempt for noncompliance with those provisions and motion for modification of the Decree to make those provisions

inapplicable to C-Section may be appropriate.

For the foregoing reasons,

IT IS HEREBY ORDERED as follows:

(1) Defendants' motion for reconsideration is denied;

(2) Defendants' alternative motion for stay is denied;

(3) Defendants' alternative request for partial reconsideration or stay is denied.

Dated: January 29, 1987

_____

Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MAURICE S. THOMPSON, et al.,

Plaintiffs,

v.

JIRO J. ENOMOTO, et al.,

Defendants.

No. C-79-1630 SAW

ORDER GRANTING PLAINTIFFS' MOTION FOR APPOINTMENT OF SPECIAL MASTER

This matter came before the court on plaintiffs' motion for appointment of a special master under Federal Rule of Civil Procedure 53. The Court, having considered the arguments of counsel, both oral and written, finds that the following "exceptional conditions" warrant the appointment of a special master in this case:

A. Defendants' record of non-compliance with the provisions of the Consent Decree entered into on October 23, 1980. *New York State Assn. for Retarded Children, et al., v. Carey*, 551 F.Supp. 1165, 1178 (E.D.N.Y. 1982), *cert denied*, 104 S.Ct. 277 (1983); *United States v. City of Detroit*, 476 F.Supp. 512, 520 (E.d.Mich. 1979). B

The complexity and detail of the Consent Decree and the conditions which it affects coupled with the Court's lack of resources to involve itself in the ongoing details of monitoring compliance and implementation. *Hoptowit v. Ray*, 682 F.2d 1237, 1263 (9th Cir. 1982).

C. Defendants' failure to present the Court with acceptable modifications of the Consent Decree, and the parties' inability to settle outstanding disputes on their own. *Cf. Halderman v. Pennhurst State School & Hospital*, 612 F.2d 84, 112 (3d Cir. 1979), *rev'd on other grounds*, 104 S.Ct. 900 (1984).

D. The strained relations between counsel for both sides, and defendants' failure to even acknowledge any violation of the Consent Decree on their part. *Ruiz v. Estelle*, 679 F.2d 1115, 1161 (5th Cir.), *modified on rehearing*, 688 F.2d 266 (5th Cir. 1982), *cert. denied* 103 S. Ct. 1438 (1983).

Accordingly,

IT IS HEREBY ORDERED THAT plaintiffs' motion for appointment of a special master is granted.

IT IS FURTHER HEREBY ORDERED that the appointment, duties, and designation of the special master shall be as set forth in the Order of Reference filed herewith.

Date: March 25, 1985

_____

Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MAURICE S. THOMPSON, et al.,

Plaintiffs,

v.

JIRO J. ENOMOTO, et al.,

Defendants.

No. C-79-1630 SAW

ORDER OF REFERENCE

For the reasons set forth in the order granting plaintiff's motion for appointment of a special master, the Court has determined that this is a proper case for reference to a Special Master pursuant to Federal Rules of Civil Procedure 53. In this order, the Special Master to be appointed will be referred to as "Monitor" *see* Fed. R. Civ. P. 53(a).

IT IS HEREBY ORDERED that the duties of the Monitor are and shall be the following:

1. To inspect from time to time each facility housing inmates under sentence of death at San Quentin State Prison.

2. To report to the Court from time to time

concerning the state of compliance with the Consent Decree and the state of conditions of confinement of inmates under sentence of death at San Quentin.

3. To conduct and facilitate negotiations with the parties.

4. To advise the Court concerning any modification or modifications to the Consent Decree that may appear necessary or that may be requested by a party.

5. To perform such other duties as the Court may assign.

The Monitor shall continue to perform these duties until such time as he may be relieved by the Court or until the Court may adopt the Monitor's written report that defendants are in full compliance with the Consent Decree. Should the Court relieve the Monitor of his duties, the Court shall have power to appoint a successor.

IT IS FURTHER HEREBY ORDERED that the powers of the Monitor are and shall be the following:

1. To enter, at any reasonable time, with or without advance notice, any part of any facility affected by the Consent Decree.

2. To interview, on a confidential basis or otherwise, any person, including any correctional staff member or inmate, affected by the Consent Decree. Defendants shall provide suitable facilities and arrangements for the conduct of such interviews under conditions satisfactory to the Monitor.

3. To attend institutional meetings and proceedings required by the Consent Decree.

4. To obtain any document in the possession of any party relevant to the state of compliance with the Consent Decree or the state of conditions of confinement in any unit which presently houses or may in the future house condemned prisoners.

5. To require the posting of notices in any part of any facility affected by the Consent Decree, in such number and form as the Monitor may direct.

6. To convene hearings concerning any matter relating to the state of compliance with the Consent Decree or the state of conditions of confinement of condemned prisoners at San Quentin. To this end, the Monitor is empowered to require the attendance of witnesses, including both prisoners and employees of the California Department of Corrections, to make a record of the proceedings, and to exercise all other powers described in Federal Rule of Civil Procedure 53(c).

7. To retain from time to time experts, specialists, or other persons whose advice or testimony the Monitor deems necessary or desirable for the purpose of making findings concerning the conditions of confinement of condemned prisoners at San Quentin.

8. To recommend at any time modification or withdrawal of this Order of Reference.

IT IS FURTHER HEREBY ORDERED that prior to filing any of his reports with the Court, the Monitor shall serve copies of the proposed report upon counsel for plaintiffs and counsel for defendants (hereinafter referred to as the two "sides"). The Monitor shall afford a reasonable time within which specific written

objections to the proposed report or any part thereof may be submitted in conjunction with specific written objections, the Monitor shall convene a hearing prior to filing the report with the Court. All reports of the Monitor shall be filed in accordance with Federal Rule of Civil Procedure 53(e)(1).

IT IS FURTHER HEREBY ORDERED that any report of the Monitor shall be adopted as the findings of fact and conclusions of law of the Court unless, within ten days after being served with notice of the filing of the report, either side moves to reject or modify the report. The Court will entertain no objection to any report unless it is shown as a preliminary matter that an identical objection was submitted to the Monitor in the form of a specific written objection in accordance with the preceding paragraph of this Order. In accordance with Federal Rule of Civil Procedure 53(e)(2), the Court shall accept the Monitor's findings of fact unless clearly erroneous.

IT IS FURTHER HEREBY ORDERED that the Monitor shall be compensated at the rate of Seventy-Five Dollars ($75.00) per hour for services performed in accordance with this Order. This rate has been determined by the Court by reference to the rate the Monitor named herein would reasonably charge for comparable services performed for private clients, and is subject to change by further order of the Court. All reasonable expenses incurred by the Monitor in carrying out his duties under this Order shall be reimbursed as costs of the mastership.

IT IS FURTHER HEREBY ORDERED that costs of the mastership, including the Monitor's fees and expenses, shall be borne by defendants. The Monitor shall submit to defendants or their designated representative periodic itemized statements of fees and expenses. All fees and expenses so requested shall be paid by defendants within fourteen (14) days of the receipt of each statement.

IT IS FURTHER HEREBY ORDERED that unless inconsistent with the express provisions of this Order of Reference, Federal Rule of Civil Procedure 53 shall govern all questions relating to the scope of this reference and the Monitor's duties and powers hereunder.

IT IS FURTHER HEREBY ORDERED that Robert R. Riggs is appointed to serve as Monitor for the Court in this action. Mr. Riggs is a member of the State Bar of California and the bar of this Court. He received the degree of Juris Doctor from Stanford Law School in 19182, where he graduated with an outstanding record. He has since served as a law clerk for a judge of the United States Court of Appeals for the Ninth Circuit. He has also served for more than a year as a law clerk for the judge presiding in this action. Mr. Riggs was appointed by this Court on October 18, 1984 to serve as Monitor in *Toussaint v. McCarthy* (N.D. Cal., No. C-73-1422SAW). In that capacity and in his earlier able assistance to this Court in the *Toussaint* case, Mr. Riggs has become thoroughly familiar with conditions of confinement in San Quentin's segregation units, including C-section.

For the reasons noted above and those detailed in the order of reference filed in *Toussaint v. McCarthy, supra,* the Court reposes special confidence in him and his capacity to serve reliably and effectively as Monitor.

Dated: March 25, 1985

_____

Judge

42 U.S.C. § 1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 U.S.C. § 1291.

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1292.

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

EDITOR'S NOTE

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No. 90-1499

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

JAMES ROWLAND, DIRECTOR,
CALIFORNIA DEPARTMENT OF CORRECTIONS, et al.,

Petitioners,

v.

MAURICE S. THOMPSON, et al.,

Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether a consent decree in a complex civil rights case should be dissolved when, over the last decade, no court has ever found defendant-prison officials have fully complied with the decree, but in prior orders and the one being appealed the court has found numerous continuing violations of the decree and two significant violations of the Constitution?

II. Whether the Eleventh Amendment bars a court from enforcing a consent decree that resolves federal constitutional issues arising from the Eighth and Fourteenth Amendments?

III. Whether the lower courts properly ruled on prison officials' motion to modify the consent decree when in granting many of the requested modifications the courts rejected the rigid Swift test, but instead applied a flexible standard in order to accommodate the state's legitimate interests in prison security and fiscal economy?

IV. Whether prison officials who, over the last eight years, have had multiple opportunities to appeal orders interpreting, modifying and refusing to dissolve a consent decree and who have acted in conformity with those orders may litigate the same issue on an appeal of an order directing them to comply with the decree?

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Respondents, the plaintiff class, consisting of more than 300 men confined on Death Row at San Quentin State Prison and subject to petitioner-defendants' custody and control, respectfully request that this Court deny the Petition for Writ of Certiorari.

OPINION BELOW

The opinion below is correctly identified in the Petition at 1. In addition, another opinion in this case filed by the Ninth Circuit relevant to these proceedings is published at 815 F.2d 1323 (9th Cir. 1987).

JURISDICTION AND STATUTES PRESENTED

These matters are accurately set forth in the Petition at 1-2.

STATEMENT OF THE CASE

A. Introduction

This case is about a Consent Decree governing prison conditions and practices for all California male prisoners who are condemned to die. Petitioners ask the Court to grant certiorari to review a Ninth Circuit decision affirming a District Court order denying in part their motion to modify the Decree and denying in full their motion to vacate the Decree. The petition is based on fundamental misconceptions about the Ninth Circuit's decision and petitioners' past conduct.

The Court of Appeals' opinion breaks no new ground when reviewing the district court's legal conclusions or discretionary decisions. It reaffirmed the use of a flexible standard for

modifying consent decrees in institutional reform litigation and properly applied the doctrine of estoppel when reviewing petitioners' claims that the Decree covered only one unit at San Quentin.

Contrary to the rosy picture petitioners paint of their conduct during the last decade, the record reveals a less charitable portrait. Petitioners have been charged with contempt seven times and have been found in contempt three times. They continue to violate the constitutional rights of condemned prisoners to this day. Their legal positions have shifted with the convenience of the moment leading the lower courts to apply the doctrines of judicial and equitable estoppel.

In the face of petitioners' continuing intransigence the District Court has had to appoint a Special Master, known as the Monitor, to investigate and resolve the issues. The Monitor has issued four reports concerning petitioners' repeated failures to abide by the Consent Decree. Petitioners have challenged the District Court twice before the Court of Appeals: once for appointing the Monitor and again for approving the Monitor's recommendations.

Now two years after the evidentiary hearing that resulted in the Monitor's most recent report, petitioners continue before this Court their struggle to rid themselves of the obligations created by their own promises made binding on them by the consent judgment.

There are four basic reasons why this Court should deny [illegible]. First, the Court of Appeals opinion does not present issues of national importance. As explained in detail below, its holdings do not conflict in any way with decisions of this Court or

of other circuits. That is true in part because the decision is extremely fact specific.

Second, it is clear from the record that the delay in resolving this case is attributable largely to petitioners' continuing violations of the Decree and the Constitution. If the Court grants the writ it will delay for another year or more petitioners' obligation to develop a plan that finally will implement provisions of a modified Decree and eventually release all parties from further litigation.

Third, despite petitioners' hyperbole to the contrary, the record demonstrates that the District Court and its Monitor have bent over backwards to accommodate prison officials' legitimate concerns arising from changed circumstances and have modified the Decree accordingly.

Both lower courts have tried faithfully to finally resolve the issues in this complex case while remaining true in principle and in fact to this Court's prior decisions, especially those touching on tenets of federalism and comity. The petition filed by prison officials presents no good reason to further extend this process.

The petition itself, however, presents an affirmative reason for denying the writ. The petition is rife with factual error and misleading statements. Rule 14.1 provides that petitioners' failure to present with accuracy the facts necessary to an adequate understanding of the questions presented is sufficient reason to deny the petition. Below respondents will set forth an accurate history of this case and specifically correct the most glaring and significant errors contained in the petition.

B. Initial Proceedings

The complaint in this action was filed in the Northern District of California on July 6, 1979 on behalf of a class consisting of all prisoners who were then or in the future would be condemned to death by the State of California and housed at California's San Quentin Prison. ER 1-30.[1/] The defendants were the Director of the California Department of Corrections and the Warden of San Quentin in their official capacities. The complaint alleged that the conditions of confinement of condemned inmates at San Quentin violated the cruel and unusual punishment clause of the Eighth Amendment, the due process and equal protection clauses of the Fourteenth Amendment, the free exercise clause of the First Amendment, and various provisions of state law.

At the heart of the complaint was the automatic assignment of all condemned prisoners to "Maximum A" status, the highest security risk classification in the California system, and their consequent confinement in administrative segregation.

The prisoners alleged that California regulations governing the placement of prisoners in administrative segregation created a

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1. The following references will be used for documents filed in this Court and the lower courts:

Petition.	Pet.
Petitioner's Appendix	Pet. App.
Excerpt of Record filed in the Ninth Circuit . . .	ER
Plaintiffs' Supp. Excerpt of Record filed in the Ninth Circuit	PSER
Clerk's Record of Documents filed in the District Court.	CR

liberty interest under which all prisoners, including the condemned, were entitled to remain in the general population unless there was a factual finding, following fair procedures, that a particular prisoner had violated prison rules or otherwise constituted a threat to institutional security. ER 5, 9. The prisoners alleged that they were wrongfully deprived of the individualized factual classification decisions afforded to all other types of California prisoners.

Consistent with their automatic Maximum A status, condemned prisoners were segregated from the general population at San Quentin and, at the time the complaint was filed, housed together in the North Segregation Unit ("North Seg"), commonly known as Death Row, on the top floor of the North Cell Block.

The prisoners complained of many aspects of the regimen imposed upon them by their security classification and segregation confinement. The regimen included solitary confinement in cells measuring four and one-half by ten feet in an unsanitary, dark and poorly-ventilated cell block, with no more than three hours of yard exercise every four days and a five minute shower twice a week. ER 6-7.

As Maximum A inmates, respondents were also subject to other significant deprivations and restrictions which were not imposed upon their general population counterparts. Condemned prisoners were manacled at all times when leaving their cells. ER 7. Unlike the general population, they were not allowed contact visits with their families and friends. Instead, they could only visit using telephones, separated from their visitors by a heavy glass barrier. ER 6. In addition, they were forced to wear waist restraints during

their visits. Id. Unlike the general population, condemned prisoners were not allowed to work or to participate in educational or vocational programs or to attend religious services. ER 8.

Respondents alleged that there was no legitimate penological or security basis for their segregation based on their death sentences alone. ER 8. In other words, a prisoner's prospects for in-prison behavior could not be determined merely from his commitment offense or death sentence. ER 6. Plaintiffs also alleged that the security precautions in effect to guard San Quentin's general population prisoners were adequate to manage the risks posed by condemned prisoners. ER 5.

C. The Consent Decree

After several months of discovery and intensive negotiations, both sides agreed to compromise and settle the litigation by means of a detailed Consent Decree (the "Decree"). The Decree was approved and entered as a judgment of the District Court on October 23, 1980. ER 49-68.

The Decree reflects a compromise of the prisoners' Fourteenth Amendment claims. Prison officials were permitted to continue segregating prisoners instead of housing them with the general population. However, petitioners were restrained from subjecting condemned prisoners as a class to the entire regimen of Maximum A segregation.

Instead, the Decree requires prison officials to afford condemned prisoners who do not present an unusual security risk and who exhibit conforming behavior (defined as Grade A condemned) many of the same rights and privileges accorded to general population

prisoners. The Decree also provides a procedure whereby a prisoner may, on disciplinary or security grounds, be reclassified to Grade B condemned and deprived of some of these privileges. A third category is Walkalones, which refers to prisoners who would be Grade A, except that other Grade A's will not tolerate them.

Unless placed in Grade B or Walkalones status, prisoners are entitled under the Decree to six hours of indoor out-of-cell time per day and twelve hours of yard exercise time per week, ER 57; to contact visits with their families and friends, ER 65-66; to a variety of yard equipment, ER 58-59; to eat lunch outside their cells with other inmates, ER 60; to religious services, ER 62-63; to participate in the art hobbycraft program, ER 62; to participate in some educational programs, ER 63; to make purchases from the prison canteen on the same basis as the general population, with certain limited exceptions, ER 61-62; and to use tier telephones for personal calls, ER 67.

Other provisions of the Decree are based on Eighth Amendment rights, including those regarding sanitation, ER 63-64; food service, ER 59-60; medical care, ER 64-65; and laundry exchange, ER 64.

Finally, the Decree attempts to guarantee due process and Sixth Amendment rights of access to the courts by providing for very limited law library facilities, ER 66-67; and attorney-client visiting procedures, ER 67.

The Decree was to expire of its own accord within one year if prison officials implemented all its provisions. ER 50. To this day, petitioners have not fully complied with the Decree.

When the Decree was entered, the plaintiff class was all housed in North Seg. Ongoing increases in the size of the class led petitioners thereafter to confine some condemned prisoners in a separate building called the Adjustment Center and others in Carson Section of the South Cell Block. Eventually, the majority of condemned prisoners were relocated to the East Cell Block.

D. A Summary of Prison Officials' Early Failures to Comply with the Decree

Petitioners claim here, without citation to the record, that prison officials remain subject to the court's jurisdiction although they have complied with the Decree in North Seg since April 1982. Pet. at 2, 17. This claim is erroneous. No court has ever found petitioners in full compliance with the Decree for prisoners housed in North Seg[2/] or any other unit. Indeed, starting shortly after the Decree was approved, noncompliance has been the norm rather than the exception.

Before the Decree was to expire by its own terms, respondents moved to extend jurisdiction because prison officials were denying to all prisoners wherever housed the type and amount of attorney and personal visits required by the Decree, and they were not properly screening correctional officers assigned to units housing condemned prisoners. CR 99, 100. Respondents also maintained that petitioners were not complying with additional provisions of the Consent Decree in the Adjustment Center. CR 100.

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2. At the time of the Monitor's two most recent investigations no prisoners were housed in North Seg because the unit was being renovated. Pet. App. A-54; ER 161.

On November 20, 1981, petitioners filed a counter-motion asking the District Court to modify the Decree to delete provisions which they claimed they could not comply with in the Adjustment Center. PSER 1. They did not contend that the Decree only applied to condemned prisoners when confined in North Seg. On January 20, 1982, the District Court modified the Decree in parts relevant to the Adjustment Center and extended jurisdiction to ensure substantial compliance.

A few month later, on April 20, 1982, the prisoners again moved to hold petitioners in contempt for failure to comply with the Decree in the Adjustment Center, even as modified. CR 137. Petitioners admitted noncompliance, but opposed the motion on the ground that compliance was impossible because of structural differences in the Adjustment Center. PSER 9. Again, petitioners did not contend that the Decree only applied to prisoners confined to North Seg. Id.

Instead of holding petitioners in contempt, the District Court continued the matter so that the parties could attempt to reach agreement upon modifications to adapt the Decree to the then current conditions in units other than North Seg. Thompson v. Enomoto, 542 F. Supp. 768 (N.D. Cal. 1982).[3/]

On January 14, 1983, respondents again moved to hold prison officials in contempt for failure to comply with provisions of the

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3. Respondents' motion also sought to modify the Decree to provide that condemned prisoners who were denied privileges for disciplinary or security reasons would be entitled to hearings as required for non-condemned prisoners under Wright v. Enomoto, 462 F. Supp. 397 (N.D. Cal. 1976), sum. aff'd sub nom. Enomoto v. Wright, 434 U.S. 1052 (1978). The court denied this aspect of respondents' motion because the right to such relief was bargained away when negotiating the Decree. Id. at 770.

Decree which were unrelated to structural differences between North Seg and the Adjustment Center. CR 172, 173. Defendants opposed the motion, but once again did not contend that the Decree applied only when condemned prisoners were confined in North Seg. CR 183. The District Court found petitioners in contempt for violating the visiting provisions of the Decree. CR 206.

Frustrated by petitioners' noncompliance with the Decree and unable to negotiate a modification of the Decree, the prisoners moved the District Court in January 1985 to appoint a Special Master. Among other reasons in support of the motion, respondents identified over 30 continuing violations of the Decree, including inadequate lighting, inadequate medical and psychiatric care, the absence of a unit law library and insufficient showers. CR 227.

The District Court granted respondents' motion and appointed a Special Master, known as the Monitor. Pet. App. A-120. The court explained that petitioners' own intransigence necessitated the appointment. Pet. App. A-120. The court cited petitioners' record of noncompliance with the Decree, as well as their failure to present the court with any acceptable modifications, or to even acknowledge any violation of the Decree. Ibid. Petitioners appealed the District Court's order to the Ninth Circuit, but the appeal was dismissed. Thompson v. Enomoto, 815 F.2d 1323 (9th Cir. 1987).

E. The Monitor's First Report

The Monitor conducted an extensive investigation of petitioners' compliance with the Decree. His findings were detailed in his First Report, filed October 31, 1986. Contrary to petitioners' assertions, the Monitor found that prison officials were not complying with the

Decree in several respects. CR 316. However, he declined to find them in contempt. He also construed the Decree to apply only to those condemned prisoners confined in North Seg. Id.

Respondents appealed the Monitor's legal conclusion to the District Court. The court reversed the Monitor and held that the Decree applied to all condemned prisoners wherever housed. Pet. App. A-106. The court based its conclusion not only on the language of the Decree, but also on petitioners' post-Decree conduct and on its previous orders. ER 86-89. Defendants did not appeal from this order. The Ninth Circuit held that this was one of the appropriate times to appeal the scope of the Decree. Pet. App. A-9.

F. The Monitor's Second Report

Early in 1987 petitioners moved to modify the Decree to allow them greater latitude to handcuff condemned prisoners. After a hearing before the Monitor, the parties reached agreement on a modification to the Decree. Under the modification, which the District Court approved, petitioners were able to handcuff prisoners in exchange for allowing prisoners to possess certain typewriters and use weights for outdoor exercise. ER 155, 157. Petitioners agreed to and sought the court's approval of the modification even though weights and typewriters are not required by the Eighth Amendment or any other provision of federal law. ER 157.

G. The Monitor's Third Report

When negotiations again failed to resolve continuing issues relating to petitioners' noncompliance, the Monitor completed his investigation. In November 1988, the Monitor issued his Third Report. ER 158-202. This Report recommended that the District Court

order petitioners to show cause why they should not be held in contempt for numerous instances of noncompliance with the Decree. The Report clearly demonstrated that there was no factual dispute about petitioners' failure to comply with the Decree. ER 162.

When the Third Report was issued, all condemned inmates had been transferred to the East Block at San Quentin, a separate structure from any of those in which condemned prisoners had been confined previously. ER 162. In his Third Report, the Monitor noted that plaintiffs were "a class within the meaning of Rule 23 of the Federal Rules of Civil Procedure, consisting of all prisoners housed under sentence of death at San Quentin State Prison, wherever housed within that Prison." ER 166.

Petitioners did not file any objections to the Monitor's Third Report with the District Court, and on December 15, 1988, the Third Report was adopted by the District Court thereby ordering prison officials to show cause why they should not be held in contempt. ER 203-04. Again, petitioners did not appeal.

H. Petitioners' Motions before the Monitor to Vacate or Modify the Decree

Before the hearing on the order to show cause, petitioners filed a motion to vacate the Decree on the ground that the object of the Decree had been fulfilled by "operation of law" because current conditions of confinement, while not in conformity with the Decree, were nevertheless constitutional. They renew that argument before this Court, claiming in their petition that the conditions of confinement "over the years more than satisfied Eighth Amendment

standards . . . ." Pet. at 3. See also Pet. at 13, 17, 18. This factual assertion is at best misleading.

Not only has the District Court never made any findings on this issue, but four years after the Decree was entered the court in another case found that the conditions in units housing condemned prisoners violated the Eighth Amendment. Toussaint v. McCarthy, 597 F. Supp. 1388 (N.D. Cal. 1984) aff'd in relevant part 801 F.2d 1080 (9th Cir. 1986) chronicled the extent to which petitioners allowed conditions to deteriorate in East Block and other units at San Quentin. The horrible conditions found by the District Court, even after a preliminary injunction had been in effect, displayed an utter disregard by petitioners for the safety and well-being of prisoners in their custody. The one and only reason petitioners improved conditions was the permanent injunction, and it took seven years, under the court's constant supervision, for them to comply with this order.[4/] For petitioners to imply here that they maintain conditions consistent with the Eighth Amendment as a product of their own free-will and good faith is a gross distortion of the facts.

Petitioners compound their misstatement by asserting that the Monitor held that the Decree substantially exceeds applicable Eighth Amendment standards. Pet. at 9. The Monitor did nothing of the kind. The only authority cited by petitioners refers to the Monitor's discussion in the Fourth Report about prisoners' due process claims under the Fourteenth Amendment. Pet. App. A-58-62.

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4. Only within the last two months did the court find that all aspects of the Toussaint injunction were being followed at San Quentin.

Petitioners also moved in the alternative to modify the Decree to conform with the manner in which they were presently confining death row inmates, thereby effectively mooting the question of contempt. CR 447. Petitioners claimed that they were complying with the Decree as much as possible under the circumstances. They renew this erroneous claim in their petition, stating that they used the Decree as a blueprint for designing a program for condemned prisoners in East Block. Pet. at 3. By their own admission, however, prison officials eliminated from the condemned program whatever provisions they considered "unnecessary [or] too burdensome." Pet. at 3. The predictable result is a program that bears little resemblance to the letter or intent of the original Decree.

One of the central features of the Decree is the opportunity for indoor out-of-cell time where prisoners can socialize and participate in programs in a fashion similar to general population prisoners. This feature is completely absent from the regimen imposed in East Block.[5] Petitioners claim that it is dangerous and costly to provide indoor exercise in East Block, but they made no attempt to provide an adequate substitute. After considering extensive evidence on this issue the Monitor and the District Court rejected petitioners' arguments. The District Court, in the order being appealed, found that petitioners could provide outdoor exercise time that is equal to or at least approximates the tier time required by

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5. Petitioners' also have discarded other significant features of the Decree, including group religious services, canteen and cell furnishings. Pet. App. A-83, 88, 93.

the Decree without significant cost or disruption of the prison routine. Pet. App. A-67.

I. The Monitor's Fourth Report

After consideration of petitioners' motions, seven days of hearing and extensive post-hearing briefing, the Monitor issued his Fourth Report on August 1, 1989. ER 205-92. That Report and the court's order adopting it are the immediate subjects of the appeal and petition for writ of certiorari.

In his Fourth Report the Monitor recommended numerous modifications of the Decree sought by petitioners, found many violations of the Decree and two constitutional violations. The violations of the Decree included (1) the absence of a roof in the exercise yard to shield prisoners from inclement weather, (2) insufficient opportunities to shower, and (3) insufficient indoor exercise. Pet. App. A-63, A-69, A-79. In addition, the Monitor found that petitioners were violating prisoners' constitutional rights under the Eighth Amendment to be free from severe unrelenting noise, and Sixth and Fourteenth Amendments to access to the courts through physical presence in an adequate law library. Pet. App. A-98-101, A-103.

Petitioners claim here that the Monitor "ignored, summarily dismissed, or discounted" petitioners' evidence. Pet. at 9. Nothing could be further from the truth. In fact, the Monitor deferred in large measure to petitioners' opinions on security related issues, even when there was little, if any, factual basis to support those opinions. Pet. App. A-72, 84, 86, 89. On the central issue of indoor tier time the Monitor expressly appraised petitioners'

evidence in considerable detail before deciding the issue, largely in petitioners' favor. Pet. App. A-63-68. Also, the Monitor recommended modifying the Decree to take away from Grade B prisoners substantial property guaranteed by the original Decree. Pet. App. A-19. The Ninth Circuit correctly found that the Monitor based his recommendations on "specific facts and evidence." Pet. App. A-20 fn. 7.

The Monitor was similarly respectful of petitioners' legitimate interests when proposing a remedy. The Monitor did not blindly recommend to the court that petitioners be ordered to comply with every letter of the Decree. Instead, he made his recommendations based on a recognition that in institutional litigation the state and public interests at stake make it inappropriate to "interpret and enforce a consent decree as if it were strictly a 'bargain' between private parties." Pet. App. A-49. The Monitor also understood that concerns for preserving federalism require that any remedies imposed by a federal court must be narrowly tailored to cure the violation. Pet. App. A-50.

Using these principles as a guide, the Monitor deferred in large measure to prison officials' security and financial concerns. For example, he accepted prison officials' security arguments that the Decree should be modified to take away from Grade B condemned prisoners certain yard equipment, cell equipment, personal property, canteen items and access to telephones. Pet. App. A-19. He refused to apply the literal terms of the Decree to require indoor exercise in East Block. Instead he adopted a common sense solution and suggested that the District Court "avoid unnecessary entanglement in

an attempt to specify what structural modification might, or might not, allow a safe tier time program in East Block." Pet. App. A-66. The Monitor recommended, and the court ordered, that petitioners submit a plan to expand pre-existing outdoor exercise yard time so that it is substantially equivalent to the indoor tier time contemplated by the Decree. Pet. App. A-68.

Also, in his Fourth Report the Monitor denied petitioners' motions to vacate the Decree or modify it to conform to existing practices. Pet. App. A-62. He further recommended that the District Court order petitioners to remedy existing constitutional violations, again through common sense and cost-effective measures.[6/]

The District Court adopted the Monitor's Fourth Report in full and denied petitioners' motion to vacate or otherwise modify the Decree. Pet. App. A-39. Petitioners' appeal to the Ninth Circuit and their writ to this Court followed.

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6. The Monitor noted that to comply with an injunction in another case pending against San Quentin petitioners developed a satellite law library in order to satisfy their constitutional obligations to another class of segregated inmates. He recommended that the Decree be modified so that condemned prisoners also have access to this library. Pet. App. A-100-101.

Similarly, the Monitor recommended applying to condemned prisoners the noise reduction measures already adopted in the other case and implemented in East Block. Pet. App. A-103-104.

REASONS FOR DENYING THE WRIT

I.

THIS COURT NEED NOT DECIDE WHETHER THE CONSENT DECREE SHOULD BE DISSOLVED BECAUSE NEITHER THE COURT OF APPEALS OR DISTRICT COURT'S DECISION CONFLICTS WITH BOARD OF EDUCATION v. DOWELL (1991) 498 U.S. ___, 112 L.Ed.2d 715

A. The Ninth Circuit's Decision

In Board of Education v. Dowell, 498 U.S. ___, 112 L.Ed.2d 715 (1991), the issue before the Court was whether a court imposed injunction concerning school desegregation should be dissolved when local officials have complied both with the injunction and the Constitution. The Court held dissolution is proper when the defendants have complied with the injunction for a reasonable period of time and were unlikely to return to their unconstitutional practices. Id. at 728.

The Ninth Circuit did not have any reason to decide this issue. In Dowell the district court issued a coercive injunction of indefinite duration. The issues presented here are framed by a voluntary consent decree that has an explicit sunset provision. Moreover, assuming the principles announced in Dowell apply to this type of consent decree, they are irrelevant because petitioners' noncompliance with the Decree was not then and is not now disputed. See Pet. at 3. Therefore, the focus of the appeal was properly on petitioners' efforts to limit or vacate the Decree for other reasons.[7]

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7. The Court of Appeals decided only the following questions: whether "(1) the district court lacked jurisdiction to modify the decree after 1982; (2) the district court exceeded

B. Dowell is Factually Different and Legally Distinct From the Issues Presented by This Case

Petitioners try in vain to fit this case into the mold of Board of Ed. Oklahoma City v. Dowell, supra, 112 L.Ed.2d 715. Their attempt fails because the central concern in Dowell -- whether local officials who are complying with the Constitution and the injunction should be subject to "judicial tutelage for the indefinite future" -- is not present.

Dowell is a thirty year old school desegregation case in which the district court imposed on local school officials an injunction to end de jure discriminatory practices. The injunction will continue of its own force unless dissolved upon proper motion. After school officials fully complied with the injunction for five years, the district court found that defendants would in the future continue constitutional practices without the burden of an injunction. Id. at 724. The court terminated its jurisdiction of the case. Ibid.

On this record this Court remanded the case back to the district court to decide, based on a totality of circumstances, whether school officials have eliminated all vestiges of past discrimination and whether school officials complied with the injunction in good faith. Id. at 729. The present case could not be more different.

This history of this case is reminiscent of the Court's recent description of the protracted litigation in United States v. Swift & Co., 286 U.S. 106 (1932): "The defendant meat-packers and their

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its jurisdiction in enforcing the consent decree outside of North Seg; and (3) the district court abused its discretion in denying prison officials' motion to vacate the decree on Eleventh Amendment grounds." Pet. App. A-13.

allies had over a period of a decade attempted, often with success in the lower courts, to frustrate operation of the decree." Dowell, at 727. The only significant difference between Swift and this case is that here the lower courts have refused to cooperate with prison officials' attempts to evade their self-imposed responsibilities under the Decree.

The injunction in Dowell continues indefinitely. That is not the case here. The Consent Decree would have expired by its own terms ten years ago if prison officials had fulfilled their part of the bargain.[8] Pet. App. A-5.

Petitioners state that the past nine years "should have been more than enough time to have 'enabled the District Court to observe the good faith of petitioners in complying with the Decree . . .'" Pet. at 19. That is certainly true; there has been time enough for accurate observation. The District Court's definitive rulings which petitioners studiously avoid, are telling -- the findings are a litany of petitioners' continued and unabated failures to comply with the Decree[9] and the Constitution.[10]

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8. In their petition, prison officials concede they are not complying with some provisions of the Decree because they have unilaterally decided they are "unnecessary" or "too burdensome." Pet. at 3.

9. For example, in 1981 petitioners did not comply with provisions concerning attorney visits and screening of correctional officers. CR. 100, 113 [court order extending jurisdiction for noncompliance]. In 1985 petitioners failed to properly maintain the unit law library, provide adequate psychiatric care, provide the prescribed number of weekly showers and permit group religious services. CR. 228, 241 [order finding noncompliance with Decree]. The monitor's most recent findings of noncompliance are set forth in Statement of Case, supra §H. See also Pet. App. at A-60-67, 98-101, 103.

In Dowell school officials took the opposite approach; they complied with the injunction. Accordingly, on remand there appears to be a substantial likelihood that the District Court may grant their motion to dissolve the permanent injunction. For California prison officials the same course remains available. Rather than fighting every step of the way, the surest road to achieve their desired goal is to promptly and consistently comply with the Decree and the Constitution. The key to ending this case is now, as it always has been, in petitioners' hands.[11]

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10. The best example is petitioners' refusal to provide condemned prisoners with access to the courts. In 1986 the Ninth Circuit held that the paging system employed by prison officials at San Quentin to provide prisoners in segregation with law books was unconstitutional under Bounds v. Smith, 430 U.S. 817, 828 (1977). Toussaint v. McCarthy, 801 F.2d 1080, 1109 (9th Cir. 1986). To comply with the Ninth Circuit's mandate, prison officials eventually set up a satellite law library for segregated prisoners. See Toussaint v. McCarthy, 918 F.2d 752 (9th Cir. 1990). Petitioners did not let prisoners on Death Row use this library or provide any other acceptable alternative.

The district court in the present case directed petitioners to allow condemned prisoners physical access to a law library. Pet. App. A-40, A-101. Petitioners appealed to the Ninth Circuit without seriously contesting this part of the order, except to the extent it is covered by their argument that the entire decree should be vacated. To this day, petitioners refuse to provide physical access to the library as required by Bounds, Toussaint and the district court's order in this case.

11. The California Department of Corrections has a history of ignoring court orders. Prison officials have been held in contempt at least one other prison case. See Toussaint v. McCarthy, 597 F. Supp. 1427 (N.D. Cal. 1984). A motion for contempt is now pending in Toussaint because of prison officials' alleged failure to comply with the preliminary injunction at the Correctional Training Facility at Soledad.

Special Masters have been appointed in two other cases involving San Quentin because of prison officials' sorry history of abiding by court decrees. See Toussaint v. McCarthy, 597 F. Supp. 1388, 1407, 1418 [court orders have been disregarded; compliance "spotty at best"]; Marin v. Rowland, C-80-0012 MHP

II.

THE NINTH CIRCUIT'S REJECTION OF PETITIONERS' ELEVENTH AMENDMENT CLAIM DOES NOT CONFLICT WITH THE DECISION IN PENNHURST OR WITH OTHER COURT OF APPEALS DECISIONS, AND BECAUSE PETITIONERS, BY AGREEING TO THE DECREE AND FAILING TO RAISE ANY SUCH CLAIM FOR MANY YEARS, LONG AGO WAIVED ANY ELEVENTH AMENDMENT DEFENSE.

The Ninth Circuit had no difficulty rejecting petitioners' claim that the Eleventh Amendment prohibits enforcement of the Decree. Pet. App. at 18-19. Petitioners assert that this ruling conflicts in principle with this Court's decision in Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984), and that the circuits are in conflict regarding whether the Eleventh Amendment bars enforcement of a decree of the kind at issue in the present case. Pet. at 22-25. Petitioners are wrong in both assertions; their attempt to persuade the Court otherwise is but another bid to delay their compliance through obfuscation of the issues.

Petitioners first assert that Pennhurst prohibits federal courts from enforcing the Decree in the instant case because, they imply, it is a remedy that does not spring from, address, or relate to a federal right. Id. at 22-23. This premise misreads Pennhurst, ignores subsequent decisions of this Court and the Court of Appeals regarding the authority of federal courts to enter and enforce consent decrees, misreads the record of this case, and overlooks the fact that petitioners long ago consented to the jurisdiction of the federal courts.

(N.D. Cal.) [special master appointed in part because prison officials failed to comply with decree regarding medical and psychiatric care].

Pennhurst held that the Eleventh Amendment bars lawsuits against state officials for injunctive relief when the only basis for that relief is to ensure compliance with state law. Pennhurst, supra, 465 U.S. at 106. The Court reasoned that no federal interest in the supremacy of federal law is present in such a case, and that, rather, a federal court instructing state officials on how to conform their conduct to state law represented a great intrusion on state sovereignty. Id. at 105-106.

The concerns regarding state sovereignty and the lack of any federal interest that were critical to Pennhurst are not applicable to the present case, where, as the Ninth Circuit stated, the lawsuit was brought against state officials to vindicate federal constitutional rights. See Pet. App. at 18; see also discussion infra. Petitioners badly misread Pennhurst.

In addition, Pennhurst recognized that Eleventh Amendment immunity may be waived, and that a State may consent to suit against it in federal court. Pennhurst, supra, 465 U.S. at 99. In the present case, petitioners waived any Eleventh Amendment defense by agreeing to the Decree, thus explicitly consenting to the federal court's jurisdiction. See Delaware Valley Citizens' Council v. Commonwealth of Pennsylvania, 678 F.2d 470, 475 (3rd Cir.), cert. denied, 459 U.S. 969 (1982); New York State Ass'n for Retarded Children v. Carey, 596 F.2d 27, 39 (2d Cir. 1979). If their consent to judgment by way of the Decree were not enough, petitioners' waiver of any Eleventh Amendment defense may be inferred from their partial compliance with the Decree and prolonged failure to raise any such

objection until many years after the Decree was entered and Pennhurst decided. See Garrity v. Sununu, 752 F.2d 727, 738 (1st Cir. 1984).

Petitioners' assertion that the Decree cannot be enforced to the extent that it provides relief not specifically required by federal law also conflicts in principle with the Court's decision in Local Number 93, International Association of Firefighters v. City of Cleveland, 478 U.S. 501 (1986). In Local Number 93, the Court held that if certain criteria were met a court in a Title VII case could enter a consent decree that provided relief in excess of that which pursuant to federal statute could have been ordered after trial as long as the remedy did not conflict with the enabling statute. Although Local Number 93 did not address an Eleventh Amendment claim, the Court's rejection of any doctrine prohibiting relief in a consent decree that may not have been available after trial, so long as the case was based on a federal question, is equally applicable to the present case, in which the Decree arises from a suit based on claims of federal constitutional violations.

Local Number 93 set forth the criteria that must be met before a district court may enter a consent decree. The Court held that before entering a decree the court must be certain that the decree: (1) "spring[s] from and serve[s] to resolve a dispute within the court's subject matter jurisdiction," (2) "come[s] within the general scope of the pleadings," and (3) "further[s] the objectives of the law upon which the complaint was based." Id. at 525. If these three conditions are met, the decree may contain relief broader than that which the court could have awarded after trial. Ibid.

The Decree in the present case meets the Local Number 93 criteria. The complaint in the present action alleged that conditions of confinement violated the prisoners' federal constitutional rights, and that federal rights to due process and equal protection were violated by petitioners' practice of automatically placing condemned prisoners in administrative segregation without individual determinations that general population housing would seriously endanger safety or security. See Statement of Case, supra. The Decree resolved these claims by, essentially, allowing petitioners to maintain certain conditions of confinement, and, with regard to the automatic segregation claim, requiring that certain general population-like conditions of confinement be provided to all prisoners, except those which petitioners determined that safety or security required segregation-like conditions. Ibid.

The Decree, in short, resolved a dispute within the District Court's subject matter jurisdiction, fit within the general scope of the pleadings, and by remedying certain conditions of confinement for all condemned prisoners and ameliorating the arbitrary classification of condemned prisoners through provision of general population-like conditions of confinement for some of the prisoners, furthered the objectives of the legal principles underlying the complaint. Under the rule announced in Local Number 93, the District Court in the present case clearly had authority to enter the Decree. Therefore, petitioners' argument that the remedy enforcing the liberty interest established by state law goes beyond constitutional minima (Pet. at 10) is beside the point.

If the court could validly enter the Decree, it could, contrary to petitioner's assertions, surely enforce it. Two Circuits have relied on Local Number 93, 478 U.S. at 525, when upholding district court orders enforcing a decree that requires more than what the court could order after trial. Kozlowski v. Coughlin, 871 F.2d 241, 244 (2d Cir. 1989); see also Duran v. Carruthers, 885 F.2d 1485, 1491 (10th Cir. 1989).

Petitioners also are wrong when they claim that the Ninth Circuit's rejection of their Eleventh Amendment arguments conflicts with other appellate decisions. First, petitioners correctly point out (see Pet. at 23-24) that the Second and Tenth Circuits (in Kozlowski and Duran) have ruled that so long as the Local Number 93 criteria are met, there is no Eleventh Amendment bar to enforcement of a decree, even where some provisions exceed the remedies required by violations of federal rights.

However, the cases cited by petitioners as being in conflict with these Circuits and the Ninth Circuit ruling herein do not in fact reach contrary conclusions. Petitioners' assertion that Lelsz v. Kavanagh, 807 F.2d 1243, rehearing denied, 815 F.2d 1034 (5th Cir.), cert. dismissed, 108 S.Ct. 44 (1987) is inconsistent is based on an overbroad reading of the court's holding. In Lelsz, the Fifth Circuit prohibited enforcement of a portion of a decree that rested entirely on state law grounds. Ibid. The Fifth Circuit, in two cases not cited by petitioners herein, has subsequently limited Lelsz to decrees or portions of decrees based solely on state law. Lelsz v. Kavanagh, 824 F.2d 372, 373 (5th Cir. 1987) (hereinafter Lelsz

II); Ibarra v. Texas Employment Commission, 823 F.2d 873, 876-77 (5th Cir. 1987).

In Lelsz II, the Fifth Circuit held that regardless of their first ruling in Lelsz, provisions of the consent decree based on federal rights could be enforced. Lelsz II, 824 F.2d at 373. In Ibarra, the Fifth Circuit rejected an Eleventh Amendment challenge to a consent decree because the suit from which the decree followed was based on federal law and again specifically limited the first Lelsz decision to portions of decrees based solely on state law. Ibarra, 823 F.2d at 877. Similarly, there is no conflict between other appellate decisions and Washington v. Penwell, 700 F.2d 570 (9th Cir. 1983), asserted by petitioners to be in conflict because it "recognized" that a consent decree may not be enforced "unless enforcement is needed to remedy a federal law violation." Pet. at 23. The court's observation in Washington does not conflict with the decision in the present case, because herein, as in Kozlowski and Duran, enforcement of the Decree is necessary to remedy a federal law violation.[12/]

In sum, the Fifth, Second and Tenth Circuits as well the Ninth Circuit in the present case have all announced and applied a consistent rule: so long as a consent decree springs from a complaint based on federal law, the Eleventh Amendment does not bar entry or enforcement of that decree. Because there is no conflict

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12. The decree provision at issue in Washington also was found to be void because it was agreed to by state officials who had no authority to enter into it. Id. at 573. Of course, there is no such deficiency with regard to the Decree in the present case.

between the circuits, and because the rule applied here is consistent with the decision in Pennhurst and follows that applied in Local Number 93, the petition for certiorari should be denied.

III.

THE NINTH CIRCUIT'S AFFIRMANCE OF THE DISTRICT COURT'S CAREFULLY CONSIDERED, FACT-SPECIFIC, FLEXIBLE RULINGS REGARDING DECREE MODIFICATIONS DOES NOT CONFLICT WITH THIS COURT'S DECISIONS REGARDING THE DEFERENCE DUE PRISON OFFICIALS BECAUSE, EVEN ASSUMING THAT DEFERENCE MUST BE GIVEN TO PRISON OFFICIALS' VIEWS IN DETERMINING MODIFICATIONS TO CONSENT DECREES, THE COURTS BELOW DID SO.

Petitioners appear to suggest that the Ninth Circuit erred because in affirming an order that failed to adopt each and every modification they proposed, the decision conflicts with this Court's decisions respecting the deference due prison officials. This assertion is first wrong because the principles which led this Court to caution federal courts to defer to state prison officials when evaluating claims of constitutional violations are markedly absent in a case where state prison officials voluntarily enter into a consent decree. The assertion is also wrong because, even assuming such deference must be given when considering modifications to a consent decree, the District Court did so in present case by carefully considering the views of prison officials and in several significant respects modifying the Decree to their advantage.

The deference federal courts must in general give to state prison officials when considering a claim of a constitutional violation or in issuing an injunction is premised on a recognition that court orders cannot easily solve the problems of prisons, that the executive, *not* judicial, branch of government is responsible for

operating prisons, and, where state prisons are involved, that comity counsels caution on the part of federal courts. Turner v. Safely, 482 U.S. 78, 85 (1987). Where judgment is entered by means of a consent decree, however, prison officials have agreed that a decree will resolve the problem, and those officials have voluntarily relinquished some of their authority to the requirements of the decree. As such, the deference due prison officials when liability is determined, or when the court imposes a remedy, should not apply. Cf. Local Number 93, 478 U.S. at 521-522 [limitations placed by Congress on limits of Title VII remedies inapplicable where judgment created by consent decree]. For this fundamental reason, the Ninth Circuit's decision cannot conflict with this Court's decisions requiring lowers courts to defer in some measure to the judgment of prison officials before issuing an injunction.

Even assuming, however, that such deference must be given to prison officials' views when modifications to a consent decree are considered, the Ninth Circuit decision does not conflict with that principle. The Court of Appeals held that a decree may be modified whenever "experience with the administration of the decree shows the need for modification in order to accomplish the primary goals of the decree." Pet. App. at A-13. This standard, with its emphasis on the practical day-to-day ramifications of decrees, itself requires courts to focus on the opinions and experience of the parties.

The Ninth Circuit's focus on "experience with the administration of the decree" also shows that the standard is a flexible one, and is not dependent on any showing of unforseen circumstances or an injustice. Indeed, the standard applied in the present case is light

years from the "grievous wrong" standard set forth in United States v. Swift & Co., 286 U.S. 106, 119 (1932).

The District Court and its Monitor properly identified the Ninth Circuit's flexible standard in evaluating the requested modifications. Although petitioners castigate the Monitor for adopting a standard for modification that is "not susceptible of any definition," they themselves then correctly state that the standard applied was one which considered all the specific facts and circumstances present. Pet. at 7-8 and fn. 4. One could hardly imagine a more flexible standard. In fact, the standard for modification of consent decrees urged by the jail officials in the Suffolk County Jail cases presently pending before the Court (see Pet. 1, fn. 1 and 59 U.S.L.W. 3546-3547) is precisely that which was applied in the present case.[13/]

The record of the present case also makes clear that the Ninth Circuit properly affirmed the order of the District Court and its Monitor regarding application of the flexible standard to the requested modifications. As the District Court stated, and as the Court of Appeals agreed, the Monitor who initially considered the requests "very thorough[ly] review[ed] and consider[ed]...all the evidence and relevant circumstances." Pet. App. at A-20.

Based on the Monitor's report, the District Court ordered some modifications as requested by prison officials.[14/] For example, based

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13. Thus, no useful purpose would be served by holding this case pending a decision in the Suffolk County Jail cases.

14. As discussed in the Statement of the Case, this was not the first time the district court had modified the decree to remedy concerns expressed by prison officials.

on prison officials' security concerns, the court substantially modified the Decree by eliminating the requirement that Grade B prisoners be allowed to possess certain items and be allowed access to a telephone. See Pet. App. at A-19 through A-20.

Similarly, in eliminating the Decree's requirement that condemned prisoners in East Block be allowed tier time, the District Court's Monitor found that enforcing that requirement would unnecessarily entangle the District Court in prison operations and might jeopardize security. See Pet. App. at A-63 through 66. Clearly, these very major modifications which significantly reduce petitioners' obligations are proof that their views were given deference.

Petitioners, however, complain that their views were not given deference because the Decree was modified to require that certain recreational equipment be placed on the outdoor exercise yard. See Pet. at 27. In complaining about this modification, petitioners fail to mention that it was coupled with a modification which eliminated the requirement that they provide such equipment indoors. See Pet. App. at A-75 through A-78. In addition, the Monitor found that petitioners presented "no evidence" that such equipment jeopardized security. Id. at A-77.

Petitioners further complain that the Decree was not modified to eliminate their obligations to provide a roof over part of the outdoor exercise yard, to provide a shelf in particular cells, and to allow certain prisoners the opportunity to purchase certain sundries. Pet. at 27. Again, petitioners ignore the fact that they presented

absolutely no evidence to support their views.[15] See Pet. App. at A-68 through A-70, A-82 through A-83, and A-87 through A-88. With respect to the yard roof, petitioners' request to eliminate the requirement was based solely on the asserted cost of compliance; the District Court, however, found that any alternative method of compliance would cost literally millions of dollars more than simply installing a roof. Id. at A-69 through 70.

In sum, the record shows that the Ninth Circuit's affirmance of the District Court's order regarding Decree modifications was correct. The District Court applied a flexible standard that gave deference to petitioners' views, and that deference in fact resulted in substantial modifications to the benefit of petitioners. Where petitioners' views did not prevail, the District Court's decision, and the Ninth Circuit's affirmance, were based on findings that the evidence presented did not support petitioners' assertions. The Court of Appeals decision does not conflict in principle or otherwise with this Court's decisions and, because a flexible standard was applied by the courts below, granting certiorari in this case would accomplish nothing but delay compliance with the modified Decree. For these reasons, the petition should be denied.

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15. Petitioners, in complaining that the courts rejected certain of their modification requests even though no evidence was adduced to support their assertions, forget that even the deference given to prison officials when determining whether constitutional violations have occurred requires judicial scrutiny, not simply pure deference to prison officials' views regarding such claims or to blind acceptance of claims that security would be jeopardized. See, e.g., Turner v. Safely, 482 U.S. at 97 (invalidating regulation requiring approval to marry because record shows rule not reasonably related to legitimate objective).

IV.

THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE APPEALABILITY OF POST-JUDGMENT ORDERS AFFECTING AN EQUITABLE DECREE

Petitioners argued in the Ninth Circuit that the Consent Decree should apply only to prisoners housed in North Seg. The Ninth Circuit rejected the argument without reaching the merits because it found that over the last eight years petitioners had numerous opportunities to appeal the issue and had treated the Decree as if it applied to prisoners in other units. The District Court held further that petitioners were judicially and equitably estopped from asserting a contrary position.

Petitioners now claim this Court should grant certiorari because there is a conflict among the circuits about the appealability of post-judgment orders affecting an equitable decree. The only decision they cite to prove a conflict is a pre-judgment case that uses the same reasoning as the Ninth Circuit in a previous ruling in this case. Because there is no conflict and estoppel would prevent petitioners from prevailing in any event, the Court should not grant the writ.

A. The Ninth Circuit's Ruling Does Not Conflict with the First Circuit

Petitioners assert that certiorari should be granted because the Ninth Circuit's opinion conflicts with Ramirez v. Rivera-Dueno, 861 F.2d 328 (1st Cir. 1988). Pet. at 29. Once again, there is no conflict to be resolved by this Court. Ramirez was a pre-judgment case in which the district court denied defendants a trial and instead appointed a special master to meet and confer with the

parties.[16] The Court of Appeals correctly characterized the order as one relating to the conduct and progress of the litigation. Id. at p. 334. Unlike the present case, there was no injunction or consent decree to be modified; it was merely a pre-trial order intended to resolve the case short of trial. In Ramirez and the present case, both circuits applied a consistent standard based on this Court's decision in Carson v. American Brands, Inc., 450 U.S. 79 (1981).

An order that grants, continues, modifies, refuses or dissolves, or refuses to dissolve or modify an injunction may be appealed under 28 U.S.C. §1292(a). In Carson, this Court set out the standard to apply in determining whether an appeal falls under this statute. First, the order should have the practical effect of granting or denying an injunction. Second, it must have serious, perhaps irreparable, consequences. Finally, the order needs to be one that can be effectively challenged only by immediate appeal. Carson, supra, 450 U.S. 79, 84.

This standard has been consistently adopted by courts throughout the circuits. See EEOC v. Pan American World Airways, Inc., 796 F.2d 314, 316-317 (9th Cir. 1986); Roberts v. St. Regis Paper Co., 653 F.2d 166, 170 (5th Cir. 1981); Chronicle Pub. Co. v. Hantzis, 902 F.2d 1028-1031 (1st Cir. 1990).

In Ramirez, the First Circuit concluded that the appointment of a special master did not meet the first prong of this test. Because the special master was only appointed to determine whether a

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16. The First Circuit granted relief by treating the appeal as a petition for writ of mandate and ordering the district court to set a trial date. Id. at 334-335.

settlement could be achieved, the order did not affect an injunction. Ramirez v. Rivera-Dueno, 861 F.2d at 334. In a similar fashion, the Ninth Circuit in an earlier opinion in the present case dismissed petitioners' appeal because the appointment of a special master did not modify the Decree. Thompson v. Enomoto, 815 F.2d 1323, 1327 (9th Cir. 1987).

Both circuits applied the same standard, used the same reasoning, and reached the same result. Carson set forth the applicable test. It is not something this Court need again decide.

B. The Appealability of the District Court's Orders.

Petitioners' main argument is not that the order appointing a special master was appealable, but that other orders applying the Decree outside of North Seg were not. This assertion is wrong, both for orders entered before and after the special master was appointed.

As early as January, 1982, the District Court rejected petitioners' opposition to expand the scope of the Decree beyond North Seg and retained its authority to ensure that petitioners substantially complied with its terms. CR. 133. Except for limited terms agreed upon by both parties, the court denied petitioners' motion for modification. Ibid.

There is, in fact, little difference between the effect of this order and the October 5, 1989, order now being contested. Both orders rejected petitioners' attempts to dissolve the Decree, applied the Decree to condemned prisoners outside of North Seg, and maintained jurisdiction to assure compliance. All parties agree that the 1989 Order is "final" under 28 U.S.C. §1291, subject to appeal. See Defendants-Appellants Opening Brief, Thompson v. Enomoto, No. 89-

16420, dated February 7, 1990, p. 1. The same is true of the earlier order.

The scope of the Decree also was at issue in June, 1982, when the District Court ordered the parties to negotiate further modifications outside of North Seg. Thompson v. Enomoto, 542 F.Supp. 758 (N.D. Cal. 1982). Petitioners could have appealed. Roberts v. St. Regis Paper Co., 653 F.2d 166, 170 (5th Cir. 1981.) [extending consent decree's scope is appealable under Carson standards].

In March, 1983, the court refused to dismiss the action simply because the Decree was being complied with in respect to the named plaintiffs housed in North Seg. CR 206; see also CR 185. Refusal to dismiss an injunction is appealable. See Kerwit Medical Products Inc. v. N. & H. Instruments, Inc., 616 F.2d 833 (5th Cir. 1980) [order denying motion to vacate consent decree].

At the same time, the District Court found petitioners in contempt for failing to maximize visiting opportunities for prisoners in the Adjustment Center, another unit outside North Seg. Reporters Transcript, dated March 17, 1983, p. 20; CR 206; Pet.App. A-113. Contempt is appealable where it appears the district court enlarged upon the original judgment. See Szabo v. U.S. Marine Corp., 819 F.2d 714, 716-718 (7th Cir. 1987) [post-judgment contempt order appealable].

Finally, in December, 1986, the court found that the Decree applied to all condemned prisoners, wherever housed in San Quentin. CR 327, 342. The practical effect of this was to enforce the Decree outside of North Seg. Petitioners agree that this order was an "interpretation" concerning the scope of the Decree. Pet. at 5. As

such, it was an appealable modification. International Assn. of Machinists v. Eastern Airlines, 849 F.2d 1481, 1485-1486 (D.C. Cir. 1988).

Thus, the Court of Appeals simply applied the same standards used by courts throughout the circuits. As such, it had ample grounds for concluding:

> It would be nonsensical to permit the prison officials to appeal the issue of the applicability of the decree to the Inmates outside of North Seg at this juncture of the case. The prison officials had their opportunity to appeal the modification of the decree . . . . Under the doctrine of the law of the case, the court's interpretation of the decree must stand.

Thompson v. Enomoto, 915 F.2d at 1390 (citation omitted).

C. Petitioners' Conduct Estops Them From Prevailing.

Even if petitioners could not have appealed the orders of the District Court described above, their own conduct estops them from successfully litigating the issue.[17/]

The District Court's ruling applied two kinds of estoppel -- equitable and judicial -- to petitioners' conduct. Pet. App. A-116. The court applied equitable estoppel because petitioners prejudiced respondents by representing in other proceedings that the Decree governs condemned prisoners outside of North Seg. Ibid; see Davis v. Waklee, 156 U.S. 680, 689 (1985).

The District Court also applied the doctrine of judicial estoppel, which prohibits a party from asserting a position in litigation that is contrary to a previously asserted position.

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17. Petitioners have not sought certiorari on this issue. Therefore, this part of the lower court's ruling is final and binding on all parties.

Rockwell International v. Hanford Atomic Metal Trades Council, 851 F.2d 1208, 1210 (9th Cir. 1988). See also, Jett v. Zink, 474 F.2d 149, 155 (5th Cir.), cert. denied, 414 U.S. 854 (1973); Scarano v. Central Ry. Co. of New Jersey, 203 F.2d 510, 513 (3rd Cir. 1953). The court found that petitioners' position is inconsistent with that taken earlier in successfully moving the court to modify the Decree in units other than North Seg. Pet. App. A-116.

The Court of Appeals made the same basic point:

> If the decree had ceased to exist in 1982, or if the decree had been confined to North Seg Inmates, it would be nonsensical for the prison officials to have attempted to negotiate modifications to the decree for eight years for the inmates housed outside of North Seg.

Thompson v Enomoto, 915 F.2d at 1389-1390.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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April 1991

CERTIFICATE OF SERVICE BY MAIL

JAMES ROWLAND, et al. Petitioners, v. MAURICE S. THOMPSON, et al., Respondents.	No. 90-1499 ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN G. DONHOFF, JR., a member of the Bar of the Supreme Court of the United States, states:

That his business address is 455 Golden Gate Avenue, Room 6200, in the City and County of San Francisco, State of California; that on May 6, 1991, he served a true copy of the attached Reply Brief of Petitioners on Writ of Certiorari in the above-entitled matter on counsel for petitioner by placing same in envelope addressed as follows:

DON SPECTER
PRISON LAW OFFICE
GENERAL DELIVERY
SAN QUENTIN, CA 94964

ROBERT R. RIGGS
15 SHATTUCK SQUARE, SUITE 205
BERKELEY, CA 94704

Said envelope was then sealed and deposited in the United States Mail at San Francisco, California, with the postage thereon fully prepaid.

JOHN G. DONHOFF, JR.
Deputy Attorney General

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IN THE SUPREME COURT OF THE UNITED STATES

JAMES ROWLAND, Director of California Department of Corrections, et al.,	)	No. 90-1499
Petitioners,	)	
v.	)	PROOF OF SERVICE
MAURICE S. THOMPSON, et al.,	)	
Respondents.	)	

I, Donald Specter, a member of the Bar of this Court, hereby certify that on the 25th day of April 1991 one copy of the Opposition to Petition for Writ of Certiorari, Motion to Proceed in Forma Pauperis and Declaration of Andrew Robertson in the above-entitled case was mailed first class postage prepaid to John Donhoff, Deputy Attorney General, 455 Golden Gate Avenue, Suite 6200, San Francisco, California 94102, counsel for all petitioners herein. I further certify that all parties required to be served have been served.

Respectfully submitted,

Donald Specter

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CERTIFICATE OF SERVICE BY MAIL

90-1499

JIRO J. ENOMOTO, et al.,

Petitioners,

v.

MAURICE S. THOMPSON, et al.,

Respondents.

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SUPREME COURT, U.S.

JOHN G. DONHOFF, JR., a member of the Bar of the Supreme Court of the United States, states:

That his business address is 455 Golden Gate Avenue, Room 6200, in the City and County of San Francisco, State of California; that on March 13, 1991, he served the required number of true copies of the Petition for Writ of Certiorari and Separate Appendix Petition for Writ of Certiorari in the above-entitled matter on counsel for respondents and the Clerk of the Court of Appeals of the Ninth Circuit, by placing same in envelope(s) addressed as follows:

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U. S. COURT OF APPEALS
NINTH CIRCUIT
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Said envelope(s) were then sealed and deposited in the United States Mail at San Francisco, California, with the postage thereon fully prepaid.

JOHN G. DONHOFF, JR.
Deputy Attorney General

Supreme Court, U.S.
FILED
MAY 8 1991
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COPY

No. 90-1499

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

JAMES ROWLAND, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, et al.,

Petitioners,

v.

MAURICE S. THOMPSON, et al.,

Respondents.

REPLY BRIEF OF PETITIONERS ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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I. PETITIONERS HAVE NEITHER "VIOLATED" THE DECREE NOR THE CONSTITUTION IN EITHER THE ORIGINAL CONDEMNED ROW OR THE OTHER FACILITIES

Respondents contend that petitioners have violated the decree continuously since its entry and that therefore *Board of Education v. Dowell,* 498 U.S.__, 111 S.Ct 630, 112 L.Ed.2d 715 (1991), does not apply. They point to the district court's 1987 interpretation of the decree to apply throughout the prison, then characterize the differences between the East Block and Carson Section programs on the one hand, and the decree on the other, as "violations." They also imply that because the district court has not found petitioners in compliance in North Segregation, petitioners are also not complying in the original condemned row, the only unit to which the decree is actually addressed. *Thompson v. Enomoto,* 815 F.2d 1323, 1324 (9th Cir. 1987); "[t]he decree ordered the Warden to implement various changes in classification and daily routines in San Quentin's North Segregation unit." Finally, respondents charge that petitioners were found to have violated the Constitution in respect to East Block noise levels and law library access.

Much of this argument was anticipated and dealt with in the petition. As noted there, petitioners never agreed to apply the decree to Grade A inmates in units other than North Segregation. While they did not object in 1982 to the decree being extended, with modifications, to the Adjustment Center for Grade B inmates, they noted in support of their 1982 request for modification that the "provisions for Grade B inmates were negotiated in light of circumstances existing over a year ago in the original condemned row." Plaintiffs' Supplemental Excerpt of Record (PSER) at 6.

Petitioners thus agreed to extend the decree's high-security program to Grade Bs housed in the Adjustment

Center, where it was possible to comply. They did not, then or since, agree that the much different and far less secure Grade A program could or would apply in units other than North Segregation. And it was not until 1986-87 that the district court reversed the special master and decided that the decree did apply in those other units.

Because the district court expressly stated that the decision was interlocutory, petitioners did not appeal. The court of appeals' decision that petitioners waived their rights to challenge that order has insulated the district court's interpretation of the decree from review. Respondents now ask this Court not only to affirm that judgment, but to do so on the grounds that the district court's unreviewed decision about the scope of the decree meant, *ex post facto,* that the program in other units "violated" the decree over the years. They then urge the Court to view petitioners' failure to comply *after* the district court's 1987 decision as resulting in more "violations," despite the fact that the litigation since then has been about whether, and if so how, the decree's provisions should be applied in other units.

Even if, however, petitioners are to be forever bound by that decision, the fact remains that they have consistently complied with their promises in North Segregation[1/] and the Constitution in that and every other

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1. Respondents' assertion that petitioners have not complied in North Segregation is more than a little disingenuous. There have been a few minor problems over the years, to be expected in regard to an omnibus, and somewhat ambiguous, decree. But when the inmates moved for contempt in April, 1982, they did so in respect only to conditions for Grade Bs who were moved to the Adjustment Center, conceding that by then petitioners had complied in North Segregation. The minor problems since -- a 1983 dispute about getting inmates to the visiting room on time; a 1985 dispute about some missing pocket-parts in the unit law library; a 1986 dispute about whether inmates should be allowed computer typewriters -- were settled by negotiation. The 68 inmates in North Segregation did

unit.[2/] That is the foundation for this petition, and why

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not complain about compliance in 1987 or, until moved to East Block, in 1988, during which time the Monitor stood ready to investigate any complaints at their request. Nor have they complained since being moved back in the Fall of 1989. It is only because the inmates have not challenged compliance there that "no court has ever found petitioners in full compliance" in North Segregation. Opp. Cert. at 8.

2. Respondents represent that the Monitor found two "serious constitutional violations" in East Block, concerning noise and law library access. They then concede, as they must, that the noise abatement measures recommended by the Monitor have been implemented in East Block. Opp. Cert at 17 n. 6. They do not make clear, however, that those improvements were made *before* the condemned inmates were moved to East Block. Petitioners therefore appealed the noise abatement modification as lacking factual support, since the condemned inmates in East Block never suffered from intolerable noise. Defendants'-Appellants' Opening Brief at 40-41 n. 13.

The law library "finding" is ironic for two reasons. First, the decree provides for a unit library with specific case reporters and other texts. Not only were petitioners found to have been complying with those provisions, they were also found to have been allowing inmates physical access to the unit law library -- not required by the decree -- in addition to paging privileges. Second, condemned inmates in California have taxpayer financed counsel throughout not only their state appeals, but federal *habeas corpus* review as well. Coupled with the unit library for which they negotiated and their paging privileges from both the main prison library and the state library system, respondents have perhaps the best "access to the courts" of any inmates anywhere in the country. Petitioners, therefore, appealed the modification requiring that the inmates be given physical access to yet another library located off the unit. If the decree is vacated, however, and the inmates feel they have a cognizable claim to that library, they are free to pursue it administratively and, if need be, in a state or federal lawsuit.

Finally, the Monitor's conclusion that the Constitution requires petitioners to escort inmates to the other library was appealed to and affirmed without comment by the court of appeals. Defendant'-Appellants' Opening Brief at 40-41 n. 13. It is fairly encompassed by this petition, since if the Writ is granted and the decree ultimately vacated or modified in accordance with the

this Court's decision in *Board of Education v. Dowell,* is indistinguishable in principle from this case.

II. PETITIONERS HAVE NOT "WAIVED" THEIR ELEVENTH AMENDMENT RIGHTS

In a somewhat contradictory vein, respondents contend, as they did in the court of appeals, that petitioners "waived" the Eleventh Amendment by entering into and *complying with* the decree. The appellate cases on which they rely, however, pre-date *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), in which this Court held, *id.* at 99 n. 8, that because the Eleventh Amendment is jurisdictional it could be raised for the first time on appeal. They also pre-date *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), which concludes that California has not waived its Eleventh Amendment immunity. *Id.* at 241. Absent an express waiver by a state's legislature, state officials are not empowered to waive the Eleventh Amendment. *Ford Motor Co. v. Dept. of Treasury,* 323 U.S. 459, 467-469 (1945).

Finally, both *Lelsz v. Kavanaugh,* 807 F.2d 1243 (5th Cir.), *reh'g. and reh'g. en banc denied,* 815 F.2d 1034, *cert. dismissed,* 484 U.S. 1057 (1987) and *Washington v. Penwell,* 701 F.2d 570 (9th Cir. 1983), hold that the Eleventh Amendment bars the enforcement of previously entered consent decree provisions. In *Penwell,* a decree provision was vacated because it exceeded the requirements set forth in *Bounds v. Smith,* 430 U.S. 817 (1977), for inmate access to the courts. In *Lelsz,* at 1253-1254, the court of

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appropriate constitutional standards, the law library order will perforce be vacated or subject to rehearing. It is premature, therefore, for respondents to represent that their "access to the courts" rights have been violated.

appeals squarely held that neither consent to entry of a decree nor compliance with its terms could be construed as an Eleventh Amendment waiver. If, as in *Lelsz*, entry and compliance cannot work a waiver in respect to decree provisions addressed to state law claims, it is difficult to see how a waiver can be found in regard to a provision -- or, as here, an entire decree -- which is addressed to no cognizable claim whatever or, at best, is an inappropriate remedy for a doubtful federal claim.

To the extent *Lelsz* and *Penwell*, however, conflict with the summary conclusion about Eleventh Amendment waiver reached in connection with a pendent state claim to attorney's fees, in *Garrity v. Sununu*, 752 F.2d 727 (1st Cir. 1984), that conflict, since the "waiver" issue is fairly included within Question II, further reinforces the petition.

III. THE DEFERENCE DUE STATE PRISON OFFICIALS REQUIRES THE COURTS TO ACCEPT MODFICATION PROPOSALS IF THEY COMPORT WITH FEDERAL LAW, NOT JUST WHEN THE OFFICIALS SATISFY AN ADDITIONAL TEST OF NECESSITY, "FLEXIBLE" OR OTHERWISE

Respondents argue that the district court, through the Monitor, applied a "flexible" standard for modification, examining each issue in light of the "specific facts and circumstances" shown in the record. They imply that the modification standard was routinely derived from Ninth Circuit case law, rather than the product of lengthy argument between the parties about what the law should be. They also represent that petitioners "presented absolutely no evidence to support their views," Opp. Cert. at 31-32, regarding the modifications they requested but which were rejected. From these premises, respondents ask this Court to conclude, apparently, that not only is there no need to review this case to determine if the district court exceeded its jurisdiction, but that the record

demonstrates sufficient deference was given petitioners' expertise by the district court.

If petitioners' challenge to the partial denial of their alternative motion to modify was merely about whether an established body of modification law had been erroneously applied, petitioners would agree that the Writ should not be granted as to Question III. The Question, however, is not about mere error. Rather, as set forth in the petition, it concerns whether, in an institutional reform case, a district court exceeds its discretionary authority if it refuses to accept a decree modification proposed by state prison officials which comports in all respects with federal law.

The issue here therefore is not only whether a "flexible" test should supplant the "grievous wrong" language from *Swift & Co.*, although petitioners submit that the court of appeals was no better than equivocal as to whether a "flexible" test is applicable to a *defendant's* modification motion. In addition, petitioners contend that *any* standard, regardless of label, that results in the denial of a request to operate a state prison in conformance with federal law but differently than set out in a decree, impermissibly sanctions district courts to exceed their subject matter jurisdiction.

A "flexible" approach to decree modification is certainly preferable to one which is "inflexible." But if the "grievous wrong" test is merely to be supplanted with a "quantum of necessity" test, *Kowzlowski v. Coughlin*, 871 F.2d 241, 247 (2d Cir. 1989)[3], all that may have been gained is the measure between near-certain failure and near-absolute uncertainty. Petitioners submit that under either approach, the burden of proof is shifted to the wrong party.

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3. The Monitor heavily relied on this case as establishing the standard to be applied to petitioners' alternative motion to modify. *See*, A-51, A-77-78.

Even if regarded as an improvement, a "flexible" approach to decree modification that results in denying to prison officials the flexibility *they* require to lawfully carry out their difficult responsibilities, still intrudes more than Article III allows into matters delegated to the states. That is especially so where, as here, prison officials approach the district court with a perfectly lawful set of proposals, only to have the court pick and choose among them according to its view of their "necessity."[4/]

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4. Respondents' assertion that petitioners "presented absolutely no evidence" to support modifications which were denied, is simply wrong. In regard to the yard roofs, Opp. Cert. at 32, citing the Monitor's Fourth Report at A-70, petitioners submitted national weather service data to show that few days in the year would be so inclement as to require a roof, that the East Block yards are protected from the wind and rain in a way that is not true of the North Segregation yard, that the North Segregation roof had been easy and inexpensive to install and that East Block roofing might pose a security risk -- interfering with gun coverage -- and that therefore the design and construction, if possible at all, would be unjustifiably expensive as compared with the alleged benefits. *See,* Defendants'-Appellants' Opening Brief at 10-11, citing to the record.

In regard to the cell shelves, Opp. Cert. at 32, citing the Monitor's Fourth Report at A-82 through A-83, petitioners showed that shelves were unnecessary because the cell-block renovation that took place in response to court orders in other cases had eliminated the cell flooding problem that had caused some inmates to complain in 1979-1980 that storage under their bunks was not secure. Petitioners also showed that, due to inmates having scavenged the shelves for metal weapons' material, security would require the design, manufacture and installation of stainless steel shelves at considerable expense. *See,* Defendants'-Appellants' Opening Brief at 10-11, citing to the record.

Finally, in regards the canteen items, Opp. Cert. at 32, citing the Monitor's Fourth Report at A-87 through A-88, petitioners presented detailed evidence of the security and management impact associated with housing a much larger condemned population in a less secure facility, and expert evidence of the security problem connected with each of the items. *See,* Defendants'-Appellants' Opening Brief at 12-14, citing to the record. Inexplicably, although the Monitor cited the same expert witness to support denying items to Grade B inmates,

This case therefore illustrates the compelling need for this Court not only to speak to the appropriate modification standard, but also to establish the outer boundaries of the discretion which must be applied to the "facts and circumstances," by those courts charged with the responsibility for supervising the implementation of institutional reform.

Where, as here, a court is asked to allow modifications that may lessen the plaintiffs' benefits but which still conform to the law, it should grant the request. A flexible test for modification, properly applied, is useful in deciding whether there is adequate justification to amend a decree when the plaintiffs contend that to do so will make an otherwise bad situation worse. By virtue of the fundamental tenets of federalism, however, such tests -- flexible or otherwise -- are inapposite to a request to merely make a good situation, in the plaintiffs' eyes, less good.

A-89 n. 39 and 40, he ignored the expert's testimony regarding the security threat posed by the Grade A inmates' canteen items. A-87-A-88. His having ignored the evidence, however, does not mean, as respondents represent, that the evidence is not in the record.

CONCLUSION

For these reasons, as well as those stated in the petition, petitioners respectfully submit that the Writ of Certiorari should be granted.

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Respectfully submitted,

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